

QUESTION 7

Husband and Wife were married in 1993. Their marriage has been stormy and arguments have been frequent, but there has been no history of physical violence. They separated three months ago, and Wife recently filed for divorce.

Yesterday evening, Husband arrived at Wife's apartment unannounced, pounded on the door, and demanded entry. After a heated argument, Husband grabbed Wife's kitten by the neck, took a knife from a kitchen drawer, and slashed the struggling kitten's throat. Husband held the bleeding, dying kitten in front of Wife's face. When Wife attempted to reach for the phone, Husband cut the cord.

After several minutes, Husband dropped the dead kitten onto the bloodstained carpet, rinsed the knife in the sink, and left the apartment. As Husband was leaving, he said: "Unless you drop the divorce action and move back home, the same thing could happen to you. Think about that!"

QUESTION:

What potential causes of action, in tort, might Wife bring against Husband?

DISCUSSION FOR QUESTION 7

In considering A's potential tort causes of action against B, three intentional torts should be considered:

1. Intentional infliction of severe emotional distress;
2. Assault; and
3. Damage to property (conversion and trespass).

INTERSPOUSAL TORT IMMUNITY DOES NOT BAR ACTION

Although the parties are still legally married, interspousal tort immunity should not operate as a bar. Interspousal tort immunity has been abrogated in most American jurisdictions, and even where it has been retained, its application is generally limited to negligent, rather than intentional, torts. RESTATEMENT (SECOND) OF TORTS (1977), Sec. 895F. Even at common law, a wife who was the victim of assault (intentional tortious conduct) at the hands of her husband, was allowed to testify. 11 A.L.R. 2d 646-7, Section 1. Wife may voluntarily testify against Husband, even in a criminal context, without violating marital privilege. Trammel v. United States, 445 U.S. 40, 54 (1980).

INTENTIONAL INFLICTION OF SEVERE EMOTIONAL DISTRESS

The tort of intentional infliction of severe emotional distress did not exist, as we know it, at common law. Recovery for mental anguish or emotional distress was allowable only if it accompanied an otherwise compensable physical injury, or was "parasitic" to another already recognized tort. ABA, MARITAL & PARENTAL TORTS: A GUIDE TO CAUSES OF ACTION, ARGUMENTS, AND DAMAGES, Chapter 7, Intentional Infliction of Emotional Distress, at p. 57.

An independent cause of action for outrageous conduct resulting in severe emotional distress was first recognized by the American Law Institute in 1948. Id.

RESTATEMENT (SECOND) OF TORTS (1965), Sec. 46 defines the elements of the tort:

- (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.
- (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress
 - (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
 - (b) to any person who is present at the time, if such distress results in bodily harm.

Under the facts presented, both the brutal killing of the pet kitten, and the verbal threat to Wife, are potentially actionable acts of Husband intended to cause severe emotional distress to Wife. The next question becomes whether the conduct is so extreme or outrageous as to be encompassed within the purview of the tort. Comment d to the above-quoted RESTATEMENT section provides in part:

Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

The torture and killing of the pet kitten would appear to offend common decency, and constitute outrageous conduct. That assertion is bolstered by one of the Illustrations to Comment f of RESTATEMENT (SECOND) OF TORTS, Sec. 46:

Illustration 11. A, who knows that B is pregnant, intentionally shoots before the eyes of B a pet dog, to which A knows that B is greatly attached. B suffers severe emotional distress, which results in a miscarriage. A is subject to liability to B for the distress and for the miscarriage.

Proof of severe emotional distress is not directly evident in the facts to date. However, Wife was clearly disturbed, and inferentially, Wife has experienced emotional distress. The severity of the distress, manifested by psychological, emotional, or physical symptoms, will be important to monitor in the days ahead. Because of the recency of the incident, signs of the severity of the distress may not have had time to fully manifest.

The verbal threat which was made upon Husband's departure also may give rise to a claim based on intentional infliction of severe emotional distress. Wife has witnessed Husband perform a brutal act, then coolly rinse off the knife, and calculatingly threaten a similar act if Wife does not reconcile. If the threat does in fact cause severe emotional distress to Wife, the threat may separately be actionable. RESTATEMENT (SECOND) OF TORTS (1965), Sec. 31, Comment a. See also, Tuggle v. Wilson, 248 Ga. 335, 282 S.E. 2d 110 (1981); Kiseskey v. Carpenters' Trust for Southern California, 144 Cal. App. 3d 222, 192 Cal. Rptr. 492 (2d Dist. 1983); Ruiz v. Bertolotti, 20 App. Div. 2d 628, 245 N.Y.S. 2d 1003 (1963).

ASSAULT:

Another potential cause of action is assault. The elements of assault are defined at RESTATEMENT (SECOND) OF TORTS (1965), Sec. 21:

- (1) An actor is subject to liability to another for

assault if

- (a) he acts intending to cause a harmful or offensive contact with the Person of the other or a third person, or an imminent apprehension of such contact, and
 - (b) the other is thereby put in such imminent apprehension.
- (2) An action which is not done with the intention stated in Subsection (1,a) does not make the actor liable to the other for an apprehension caused thereby although the act involves an unreasonable risk of causing it and, therefore, would be negligent or reckless if the risk threatened bodily harm.

In reviewing the facts, the killing of the kitten would not constitute offensive contact with a third "person." The verbal threat was undoubtedly intended to cause apprehension, but the threat was conditional, and referred to a future, rather than an imminent, harmful contact. RESTATEMENT (SECOND) OF TORTS (1965), Section 31, states:

Words do not make the actor liable for assault unless together with other acts or circumstances they put the other in reasonable apprehension of an imminent harmful or offensive contact with his Person.

Because one essential element, the fear of IMMEDIATE harm, appears to be lacking, assault may not be actionable. An Illustration included in Comment b to RESTATEMENT (SECOND) OF TORTS (1965), Section 31, supports this conclusion:

1. A, known to be a resolute and desperate character, threatens to waylay B on his way home on a lonely road on a dark night. A is not liable to B for an assault under the rule stated in Section 21. A may, however, be liable to B for the infliction of severe emotional distress by extreme and outrageous conduct, under the rule stated in Section 46.

Although a case can arguably be made, premised on an assault theory, the conclusion that the threat alone does not constitute an assault is more readily supported by the facts.

DAMAGE TO PROPERTY:

Finally, Husband may be liable to Wife for the damage done to personal property during the course of the incident. The killing of a pet would constitute conversion of Wife's personal property. RESTATEMENT (SECOND) OF TORTS (1965), Sections 222A and 223.

Husband has so seriously interfered with Wife's right of control over her pet, that he may be liable for the full value of the cat. Id.

Illustration 17, included in the comments to Section 222A, provides support for a cause of action based on conversion:

A intentionally shoots B's horse, as a result of which the horse dies. This is a conversion.

Additionally, the damage to the carpet and phone cord, caused by Husband's conduct, may be actionable in tort on a theory of Trespass to Chattels. The elements of that tort are defined at Section 217 of the RESTATEMENT (SECOND) OF TORTS:

A trespass to a chattel may be committed by intentionally

(a) dispossessing another of the chattel, or

(b) using or intermeddling with a chattel in the possession of another.

CONCLUSION:

Wife has a viable cause of action against Husband on a theory of Intentional Infliction of Severe Emotional Distress, provided the severity of Wife's distress can be proven. Wife may not have a cause of action for assault, since the verbal threat and menacing gestures may not have placed her in imminent apprehension. Wife's testimony might, however, establish the missing element. Finally, Husband should be liable to pay damages for conversion of the pet, and trespass for damaging Wife's property. Since each of the above-mentioned torts is an intentional tort, and since Wife presumably would be willing to testify against Husband, interspousal tort immunity will not bar these tort actions.

Examine # _____

Final Score _____

SCORESHEET FOR QUESTION 7
ASSIGN ONE POINT FOR EACH STATEMENT BELOW

SCORE SHEET

1. Husband may be guilty of intentional infliction of severe emotional distress. 1. _____
 - 1a. Intentional act (purposeful conduct, intended consequences, or recklessness will suffice) 1a. _____
 - 1b. Outrageous conduct 1b. _____
 - 1c. Causation 1c. _____
 - 1d. Severe emotional distress 1d. _____
2. Even though his violent act was directed to a pet, Husband's conduct would probably be seen as outrageous. 2. _____
3. No evidence yet of Wife's severe emotional distress; It will have to be proven. 3. _____
4. Assault may be another available cause of action. 4. _____
 - 4a. Defendant acts intending to cause a harmful or offensive contact with Plaintiff or a third party, and 4a. _____
 - 4b. Plaintiff is in imminent fear of such contact. 4b. _____
5. Damage to property may provide another cause of action in tort (killing the pet, ruining the carpet, and cutting the phone cord). 5. _____
6. Interspousal tort immunity will not defeat these causes of action. 6. _____
7. False imprisonment. 7. _____

QUESTION 7

On a Saturday night at approximately 11:30 p.m., nine year old Sally was skating at the Whoville ice skating rink. While skating, Sally's leg was slightly injured when a piece of debris was playfully kicked in her direction by another skater, a twenty-five year old mentally disabled person. Sally had previously injured the leg in the same place when she fell earlier in the evening at the rink. The fall was caused by Sally stumbling on debris that had accumulated on the ice.

A Whoville city ordinance, enacted "to reduce juvenile violence, crime, and other misconduct," forbade children under the age of fifteen to be at "movie theaters, bowling alleys, or other places of public amusement" after 11 p.m. on weekends unless accompanied by an adult. Sally's mother had left Sally at the skating rink at 6 p.m. on the night in question, intending to pick her up at 10 p.m. Sally's mother, however, failed to pick up Sally until 11:45 p.m. that evening.

The previously described injuries caused a latent condition to flare up in Sally's leg, eventually resulting in loss of the limb.

QUESTION:

Identify and discuss potential tort claims Sally may have against (1) the mentally disabled person, and (2) the skating rink. Also discuss any possible defenses to these claims.

DISCUSSION FOR QUESTION 7

Liability of the Mentally Disabled Person

An adult is held to a reasonable standard of care, even if mentally disabled. McGuire v. Almy, 297 Mass. 323, 8 N.E.2d 760 (1937). Eighteen is the age at which persons are often treated as adults. Goss v. Allen, 70 N.J. 442, 360 A.2d 388 (1976). Therefore, the mentally disabled person in this situation would be held to an adult standard of care, and may be liable for negligence. The elements of negligence are (1) negligent act of the person; (2) damages or injuries are suffered by the Plaintiff; and (3) the negligent act was the proximate cause of the damages or injuries. See Independent Lumber Co. v. Leatherwood, 102 Colo. 460, 79 P.2d 1052 (1938).

The mentally disabled person may also be liable to Sally for battery -- the intentional touching of another person with intent to harm or offend. Restatement (Second) of Torts §§13, 18. The fact that the person was acting playfully will not bar recovery, as long as the act was not lawful or privileged. Vosburg v. Putney, 80 Wis. 523, 50 N.W. 403 (1891). The elements of battery are (1) defendant's intent to make contact with another; (2) defendant's act resulted in contact with another and (3) the contact was harmful or offensive. See Restatement (Second) of Torts §13, 18 (1965)

A person normally takes the tort victim as he finds her. Vosburg v. Putney, supra. Therefore, the fact that Sally previously had been injured, and had a latent condition, would be no defense to her claim.

Liability of the Rink

The rink may be guilty of negligence in allowing debris to accumulate on the ice, if it had notice of and a reasonable opportunity to remove it before the accident. Mendoza v. City of Corpus Christi, 700 S.W.2d 652 (Tex. App. 1985). If found negligent, the rink can be liable for the reasonably foreseeable injuries to Sally, including the later exacerbation of her injury by the mentally disabled person. McPeake v. Cannon, 381 Pa. Super. 227, 553 A.2d 439 (1989).

The rink also may be negligent for not removing the debris that caused the second injury. Sally is an invitee of the rink rather than trespasser or licensee, and as such, can recover if the rink failed to reasonably protect against damages of which it knew or should have known. Mile High Fence v. Radovich, 175 Colo. 537, 489 P.2d 308 (1971). As with the mentally handicapped person, the rink takes its victim as it finds her.

The rink may contend Sally was contributorily negligent in not seeing or avoiding the debris, thus barring or reducing her recovery. In determining this issue, Sally will be held to the standard of care of a minor of like age, intelligence, and experience. Restatement (Second) of Torts §283A.

The negligence of Sally's mother in not picking her up by 11:00 p.m. cannot be charged to Sally as her child. Public Service Co. v. Petty, 75 Colo. 454, 226 P. 297 (1924)



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Essay 7 GradeSheet

Seat

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Score

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Negligence is comprised of::

- 1. Negligent act by Defendant (duty and breach). 1. _____
- 2. The negligent act was the proximate cause of the damages. 2. _____
- 3. Sally suffered damages. 3. _____

Battery is comprised of:

- 4. Intent to make contact with another. 4. _____
- 5. Defendant's conduct resulted in contact. 5. _____
- 6. The contact was harmful, offensive or non-consensual. 6. _____
- 7. The mentally disabled person would be held to an adult standard of care. 7. _____
- 8. The person takes his tort victim as he finds her. 8. _____
- 9. Sally was an invitee of the rink. 9. _____
- 10. The rink may have been negligent if it knew or should have known of and did not remove the debris accumulation. 10. _____
- 11. The rink may be liable for the foreseeable worsening of Sally's condition. 11. _____
- 12. Comparative or contributory negligence, or assumption of the risk, if any, may be argued as a defense. 12. _____
- 13. A child's conduct will be measured by a child's standard of care, and, the negligence of apparent cannot be charged to her child. 13. _____
- 14. Negligence per se could be raised as a defense by either the rink or the handicapped person. 14. _____
- 15. Negligence per se will not be a successful defense because the ordinance was not intended to protect against this kind of harm. 15. _____

QUESTION 8

Sam was an expert skier who had skied all over the world. One day, he and his friend Sandra, who was also an expert skier, decided to ski at the Happy Trails Ski Resort. They purchased lift tickets on which was printed, in relevant part: "Please read. Skiing is a dangerous sport with inherent risks. In purchasing and using this ticket, purchaser or user agrees to accept the risks inherent in skiing, and agrees not to sue Happy Trails Resort, or its employees, if injured while using the ski facilities...."

After warming up on some of the easier slopes, Sam and Sandra took a chair lift to Black Diamond Hill. On the right side of Black Diamond, the ski run ended at the edge of the trees and was clearly marked with large "No Skiing" signs. The left side of the slope had been groomed nearly all the way to the left edge. A mound of snow one foot higher than the groomed area formed a berm that ran along the left edge of the run. Beyond the groomed area and the berm on the left side of the run, the area was ungroomed and dropped off severely. There were no signs, markers, or obstructions to warn skiers of the danger.

Happy Trails' failure to place signs on the left side of the run violated a local ordinance requiring ski areas to maintain a sign system, including signs indicating the level of difficulty of the area's slopes and trails, notices that warn of danger areas, closed trails, and ski area boundaries.

Sam began to ski down the left side of Black Diamond, followed by Sandra. About halfway down the run, he caught an edge, lost his balance, skied over the left berm, and slid into the unmarked area. Sandra found Sam at the bottom of an eight foot drop, sprawled out and screaming for help. She immediately called for the ski patrol. When the ski patrol arrived, they administered first aid and then took Sam down the slope to a waiting ambulance. Sam was transported to the local hospital where he was treated for a severely fractured right leg.

QUESTION:

Discuss potential civil causes of action that Sam may have against Happy Trails and any possible defenses that Happy Trails might assert. Do not discuss damages.

DISCUSSION FOR QUESTION 8

The issue in this case is whether or not Sam will be able to successfully bring a lawsuit for negligence against Happy Trails Resort for his skiing accident, considering the fact that he purchased and used a ski ticket which had a purported release of liability clause noting that the user/purchaser of the ticket accepted the risks inherent in the sport. Thus, in order to fully answer this question, an examinee must explain both the general law of negligence and also must explain the tort theory of assumption of the risk. She should also consider an argument that the ski area was negligent per se.

Negligence

The elements of a cause of action for negligence are:

- a) a duty or obligation recognized by the law, requiring a person to conform to a certain standard of conduct for the protection of others against unreasonable risks;
- b) a failure on the person's part to conform to the standard required (i.e., a breach of duty);
- c) a reasonably close causal connection between the conduct complained of and the resulting injury, known as proximate or legal cause; and,
- d) actual loss or damage to the interest of another.

W. Page Keeton, *Prosser and Keeton on the Law of Torts*, Section 30 (5th ed. 1984); *Martinez v. Lewis*, 969 P.2d 213 (Colo. 1998). Negligence is defined as "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm." *Restatement (Second) of Torts* Section 282. Negligent conduct may consist of either an act or an omission to act when there is a duty to do so. Id.

Here, the duty or obligation of Happy Trails would consist of either modifying the steep left dropoff on Black Diamond Hill, blocking it by a fence or some other barrier, or, at the very least, notifying the patrons of the ski resort that the left dropoff on the slope existed, and that it was a "no ski" danger area. The duty of Happy Trails was breached through this failure to either block or to warn (an omission) which resulted in the plaintiff's lack of protection against unreasonable risk of harm. Causation should be fairly easy for Sam to prove; "but for" the unmarked steep dropoff, he would not have broken his leg in this skiing accident. The final element of negligence, that of actual loss, injury, or damage, should be easy for Sam to demonstrate: he has a severely broken leg.

Negligence per se

Sam also could assert a claim that Happy Trails was negligent based upon its violation of the statutory provision related to skier safety, that it is liable for negligence per se. Jurisdictions often enact statutes requiring ski areas to take certain actions in order to protect skiers, including such things as: maintaining a sign system indicating the level of difficulty of the area's slopes and trails, giving warnings of danger areas, closed trails, and ski area boundaries, and marking man-made structures that are not readily visible to skiers. See, e.g., the Colorado Ski Safety and Liability Act, Sec. 33-44-101 to 33-44-114, CRS (1999).

The proof of fault required to demonstrate negligence per se is that the defendant violated the standard of care set forth in a statute or ordinance. Lui v. Barnhart, 987 P.2d 942, 945 (Colo.App. 1999). A statute or ordinance defines the standard of care for a claim of negligence per se if the plaintiff is a member of the class which the statute or ordinance was intended to protect and if the injuries suffered were the type the statute or ordinance was enacted to prevent. Id. at 946. Any violation of a statute's provisions applicable to the plaintiff constitutes negligence on the part of the Defendant. Bayer v. Crested Butte Mountain Resort, Inc., 960 P.2d 70, 74 (Colo. 1998).

Here, the local jurisdiction had in effect a statute regulating the actions of ski areas in protecting their patrons and requiring that the ski area post signs warning of dangerous areas. Sam can argue that Happy Trails was negligent per se for violating the requirements of that statute and not posting a sign warning of the steep drop off on the left side of Black Diamond Hill.

Assumption of the Risk

Happy Trails may raise Sam's assumption of the risks of skiing as a defense to the possible cause of action for negligence. The legal concept of assumption of the risk generally requires: 1) that the plaintiff must know that a risk is present, and 2) he must understand the nature of the risk. Further, the plaintiff's choice to incur the risk must be voluntary. Keeton, supra, sect. 68; Carter v. Lovelace, 844 P.2d 1288, 1289 (Colo. App. 1992). In general, the plaintiff, in assuming the risk, has given his express consent or implied consent in advance, thus relieving the defendant of an obligation to him. Keeton, Id. However, under ordinary circumstances, the plaintiff, even in meeting the above criteria, will not be taken to assume any risk of either activities or conditions of which he has no knowledge. Id.

In this case, Sam has purchased and used a ski ticket which notes that in purchasing and using the ticket, he agreed to accept the risks that are inherent in the sport of skiing. He also gave a purported release to Happy Trails, in agreeing not to sue them for getting injured while skiing. However, examinees should note that Sam was accepting (or assuming) only those risks known to him to exist in the sport of skiing. As an expert skier, he obviously knew those risks. But, as Prosser and Keeton note, Sam will not be assumed to have accepted the risk of the conditions that were unknown to him — namely, the improperly barricaded and unmarked dropoff on the ski slope which caused his injury. Even though he caught an edge in skiing and this caused the start of his problems, his ultimate injury was caused by the dropoff at the edge of the slope. Because of this, he cannot be said to have assumed the risk in this circumstance.

In addition, Sam could raise the argument in response that the language on the back of the lift ticket would operate to relieve Happy Trails of its duties imposed by any statute. It therefore would not effect Sam's negligence per se claim. Statutory provisions may not be modified by private agreement if doing so would violate the public policy expressed in the statute. Phillips v. Monarch Recreation Corp., 668 P.2d 982, 987 (Colo. App. 1983; In Re Marriage of Johnson, 42 Colo. App. 198, 591 P.2d 1043 (1979). Since the statute here placed a duty upon Happy Trails to post signs in order to keep Sam safe, a trial court could exclude evidence of a purported agreement intended to alter those duties. Phillips, id.



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Essay 8 GradeSheet

Seat

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Score

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1. Identification of negligence as the potential cause of action. 1. _____
 - 1a. Elements of negligence are: duty, breach, causation, and loss or damage. 1a. _____
2. Happy Trails had duty to exercise reasonable care. 2. _____
3. Happy Trails had a duty to either modify the dropoff, block it with a fence, or notify the ski patrons of the dropoff. 3. _____
4. Happy Trails breached its duty by not choosing to modify or to mark the dropoff in some way. 4. _____
5. Causation can be proved; "but for" the unmarked steep dropoff, Sam would not have broken his leg in this accident. 5. _____
6. Final element of negligence — injury or loss — can be proven in this case, considering the injury. 6. _____
7. Identification of negligence per se as a potential cause of action. 7. _____
8. Happy Trails liable for negligence per se if it violated standard of care set forth in applicable statute. 8. _____
9. Identification of comparative/contributory negligence as possible defense. 9. _____
10. Identification of assumption of risk as a possible defense. 10. _____
11. Explanation that assumption of risk requires that the plaintiff know that a risk is present and he must understand its nature. 11. _____
12. Here, Sam will probably not be assumed to have accepted the risk of his accident, because the conditions of that risk were unknown to him. 12. _____
13. Ski ticket provisions would not relieve Happy Trails of any injuries caused by risks unknown to skiers or duties imposed by statutes. 13. _____

QUESTION 6

Peter Plaintiff is a seven-year old boy who lives with his family in a residential neighborhood next door to David Defendant. Defendant owns a large dog, Rover, which he usually keeps chained outdoors at his residence. The chain is fifteen feet in length and attached to a large metal stake hammered into the ground. On several different occasions persons, adults and children alike, have entered onto Defendant's property and, approaching too close, have been bitten by Rover. Defendant knows of Rover's aggressiveness; in fact, he keeps Rover as a watchdog to keep people off his property. Defendant has posted signs warning passersby that Rover will attack anyone coming onto the property. Plaintiff has never been bitten by Rover. He has been warned by his parents not to get near Rover because Rover is likely to bite him if he does.

One rainy day Defendant chained Rover in the usual way before leaving for work. Defendant noticed that the rain had soaked the ground and made it quite soggy. Later in the day, thinking that Defendant was at work, Plaintiff began teasing Rover. Plaintiff stood on the sidewalk (not on Defendant's property) about ten feet beyond the reach of Rover's chain. Plaintiff yelled, waved his arms, and made faces at Rover. Rover began lunging at Plaintiff. Finally, the force of Rover's lunges pulled the stake from the wet, rain-soaked ground. Dragging his chain, Rover chased Plaintiff, caught him, and bit him several times, inflicting wounds which required approximately thirty stitches to close.

QUESTION:

Analyze Plaintiff's possible tort claims against Defendant and any defenses Defendant may have.

DISCUSSION QUESTION 6

NEGLIGENCE

To establish a prima facie negligence claim, the elements of duty, breach, causation and damages must be present. *See generally* W. Prosser & R. Keeton, *The Law of Torts* § 30 (5th ed. 1984).

A breach of duty, or negligence (negligent conduct, as opposed to a claim sounding in negligence), consists of conduct falling below a legally applicable standard of care for avoiding foreseeable unreasonable risks of harm to others. *See id.* As the defendant belongs to no special class of persons, his duty should probably be the duty of ordinary care. The most famous formulations of this general standard of ordinary care are the reasonable person standard and the weighing of the magnitude of the defendant's risk against the burdens to which the defendant would have been put to avoid that risk. The standard of ordinary care, as it is best understood, requires a person to exercise the care which would be expected of a reasonable person of ordinary prudence to avoid foreseeable unreasonable risks of physical harm to those others who would foreseeably be endangered by such risks. *Vaughan v. Menlove* [1837] 3 Bing. N.C. 468, 132 Eng. Rep. 863. The most famous formulation of this balancing is found in Judge Learned Hand's opinion in *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). There Judge Hand likened this balancing to a formula in which B is the burden to the defendant of taking precautions to avoid the risk, P is the probability that the defendant will be injured if those precautions are not taken, and L is the severity of the defendant's probable loss if those precautions are not taken. Given those elements of the formula, a defendant will be negligent if $B < PL$. *Id*

There will be a sufficient causal connection between the defendant's negligence and the plaintiff's harm if the defendant's negligence was both the cause in fact and the proximate cause of the plaintiff's harm. The usual test of cause in fact is the "but-for" test: can it be said that but for the defendant's negligence, the plaintiff would not have been harmed. *New York Central R.R. v. Grinnstad*, 264 F. 334 (2d Cir. 1920). If the answer to this question is affirmative, then the defendant's negligence is a cause in fact of the plaintiff's harm. Here, if the defendant's negligence was in leaving the dog chained outside when a reasonable person would have known the dog's stake to be loose in the soft, muddy ground, then cause in fact seems clear.

There is no single general principal defining proximate causation. A knowledgeable answer will mention that for reasons of policy the courts have sometimes seen fit to limit the liability of a defendant whose negligence is a cause in fact of the plaintiff's harm. *See generally* W. Prosser & R. Keeton, *The Law of Torts* §§ 42-44 (5th ed. 1984). None of these reasons seems to be present in this case: if the

defendant is negligent, it is because harms like this are foreseeable; there are no intervening causes, so the causal link between the defendant's negligence and the plaintiff's harm seems to be direct.

The basic principal of compensatory damages in tort is to put the plaintiff back in the position which he enjoyed before the accident, to the extent that a monetary award can accomplish that. For this reason, the law attempts to estimate all the plaintiff's losses which were legally caused by the defendant's negligence, including not only the past and future costs of treating the injury, but also past and future pain and suffering, and past and future lost earnings or reduction in earning capacity, if any.

DEFENSES

The negligence of a plaintiff, entitling the defendant to a defense, is defined in the same way as the negligence of a defendant: any breach of a duty to avoid foreseeable unreasonable risks to oneself which is a legal cause of the plaintiff's harm. *Butterfield v. Forrester*, [1809] 11 East 60, 103 Eng. Rep. 926. However, in this case the standard by which the plaintiff's duty is measured will differ, since the plaintiff is a minor, and the effect of the plaintiff's negligence will differ depending whether the jurisdiction follows the older doctrine of contributory negligence or the newer doctrines of comparative negligence. A child is required to exercise the care ordinarily expected of a reasonably prudent child of like age, intelligence, maturity, experience, and judgement. *Smith v. Diamond*, 421 N.E.2d 1172 (Ind. App. 1981). If this case is tried in a jurisdiction which continues to apply the old doctrine of contributory negligence, any causal negligence of the plaintiff completely bars the his recovery. This doctrine is followed in fewer than ten states today. Under the newer doctrines of comparative negligence, the plaintiff will receive an apportioned verdict, apportioned according to the trier's estimate of the relative negligence of the defendant and the plaintiff. In a pure comparative negligence state the plaintiff will recover an apportioned verdict in all cases. In a modified comparative negligence state the plaintiff will take nothing if his negligence is greater than the defendant's (in some states) or is equal to or greater than the defendant's (in others); but otherwise the plaintiff will receive an apportioned verdict.

As the plaintiff appears to have believed Rover to be safely chained, he appears not to have been aware that there was a risk he could be attacked and bitten. Assumption of risk therefore appears not to be a good defense, even if the jurisdiction has not abrogated implied assumption of risk.

STRICT LIABILITY

At common law it was long accepted that the owner of an animal dangerous to humans was strictly liable for any harm to a person caused by the animal. *Baker v. Snell*, [1908] 2 K.B. 825. There are two such classes of dangerous animals: animals of a species not ordinarily domesticated and known to be dangerous to people (e.g., tigers, poisonous snakes, etc.); and domestic animals whose owner is on notice of some dangerous propensity of the individual animal. As the defendant knows that Rover has bitten people in the past, Rover falls into the second class of dangerous animals subject to strict liability.

The defenses to this type of claim are the same as above, but at common law, they were not equally recognized as defenses to claims in strict liability. The older rule is that the plaintiff's contributory negligence is no defense to a strict liability claim.

Since the advent of comparative negligence, quite a number of jurisdictions have abandoned the old refusal to recognize the plaintiff's negligence as a defense, at least in the products liability area of strict liability, holding that the plaintiff's negligence may appropriately reduce the plaintiff's verdict. In some jurisdictions, there would appear to be a good chance that this would similarly apply to a common law strict liability claim of the keeping of a dangerous animal.



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Essay 6 GradeSheet

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1. Peter has a claim against David for negligence. 1. _____

2. The elements of negligence are:
 - a. Duty 2a. _____
 - b. Breach of that duty 2b. _____
 - c. Causation 2c. _____
 - d. Damages 2d. _____

3. David's duty is to prevent foreseeable and unreasonable risk of harm to others by taking reasonable steps to protect against a vicious dog. 3. _____

4. David's breach must be the actual and proximate cause of Peter's injuries. 4. _____

5. Peter's claim may be barred or diminished by contributory negligence. 5. _____

6. Peter's claim may be barred or diminished by comparative negligence. 6. _____

7. Peter's standard of care is that of a reasonably prudent child of like age, intelligence, maturity, experience and judgment. 7. _____

8. Peter may have a claim for strict liability against David for harboring a known vicious animal. 8. _____

QUESTION 6

Pam lives in a new housing development in a well-to-do residential suburb. Contractor was hired by the owner of the lot adjoining Pam's home to construct his new home. In order to construct the foundation for the house, it was necessary to use explosives to remove rock which was very near the land's surface. Pam was not aware of the need to use explosives in the construction.

Contractor, who was properly licensed and bonded for the handling and use of explosives, exercised reasonable care in all relevant aspects of the construction. Nonetheless, an unexpectedly-strong concussion from detonation of the explosives caused serious structural damage to Pam's home.

QUESTION:

Discuss theories under which Pam may recover compensatory damages caused by the explosion.

DISCUSSION FOR QUESTION 6

The facts of the question are designed to steer applicants *away from* discussion of negligence, nuisance, or trespass to land and *toward* discussion of strict liability in tort for abnormally dangerous activity (as denominated by the Restatement (Second) of Torts) or ultrahazardous activity (the term used by the original Restatement of Torts) by declaring that Contractor, the only defendant referred to in the interrogatory, "exercised reasonable care in all relevant respects." The question limits applicants to discussion of Pam's right to recover compensatory damages from Contractor, thereby eliminating the need to discuss punitive damages or the rights or liabilities of the owner of the lot adjoining Pam's home.

The American Law Institute has restated the doctrine of strict liability in tort for abnormally dangerous activity in §§ 519-524A of the Restatement (Second) of Torts (1977). It appears that Colorado common law (1) recognizes the doctrine of strict liability in tort for abnormally dangerous or ultrahazardous activity; *Western Stock Ctr., Inc. v. Sevit, Inc.*, 195 Colo. 372, 578 P.2d 1045, 1050 (1978), *Ward v. Aero-Spray, Inc.*, 170 Colo. 26, 458 P.2d 744, 746 (1969); (2) might well apply the criteria of Restatement (Second) of Torts § 520 for determining whether an activity is abnormally dangerous or ultrahazardous; *Huddleston v. Union Rural Electric Assn.*, 841 P.2d 282, 290 n.10 (Colo. 1992), *Smith v. Home Light & Power Co.*, 734 P.2d 1051, 1053 and n.4 (Colo. 1987), *Lui v. Barnhart*, 1999 WL 626791 at *2 (No. 98CA1003, Colo. Ct.App. Aug. 19, 1999), *Walcott v. Total Petroleum, Inc.*, 964 P.2d 609, 614 (Colo. Ct. App. Aug. 20, 1998), *Hartford Fire Ins. Co. v. Public Service Co. of Colo.*, 676 P.2d 25, 27 (Colo. Ct. App. 1983), *but see, Cook v. Rockwell Intern. Corp.*, 181 F.R.D. 473, 486 (D. Colo. 1998) (applying less stringent requirements in determining abnormally dangerous activity).; and (3) would likely hold Contractor strictly liable for blasting damage on these facts, *Western Stock Ctr., Inc. v. Sevit, Inc.*, 195 Colo. 372, 578 P.2d 1045, 1050 (1978), *Garden of the Gods Village, Inc. v. Hellman*, 133 Colo. 286, 294 P.2d 597, 291 (1956), *Cass Co.-Contractors v. Colton*, 130 Colo. 593, 279 P.2d 415, 417-19 (1955), *Mannhard v. Clear Creek Skiing Corp.*, 682 P.2d 64, 65 (1983 (citing *Garden of the Gods Village, Inc. v. Hellman, supra*).

II. Elements of the Prima Facie Case

Plaintiff must establish duty and proximate cause, and thus foreseeability, to prevail on a claim of strict liability for abnormally dangerous or ultrahazardous activities. *Walcott v. Total Petroleum, supra*. As contrasted with negligence, the duty owed is an absolute duty to make safe the abnormally dangerous condition, and liability is imposed for any injuries to persons or property resulting therefrom. *Western Stock Center, Inc. v. Sevit, Inc.*, 195 Colo. 372, 379; 578 P.2d 1045, 1050.

Courts generally impose three requirements in finding an activity to be ultrahazardous:

1. The activity must involve a risk of serious harm to persons or property;
2. The activity must be one that cannot be performed without risk of serious harm no matter how much care is taken; and
3. The activity must not be a commonly engaged-in activity by persons in the community.

Cook v. Rockwell Intern. Corp., 181 F.R.D. 473, 486 (D. Colo. 1998).

The Restatement (Second) of Torts, which takes an approach followed by a minority of courts, additionally takes into accounts the value of the activity and its appropriateness to the location, declaring that, in determining whether an activity is abnormally dangerous, the following factors are considered:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.

Restatement (Second) of Torts § 520 (1977).

The American Law Institute notes that "[i]n determining whether the danger abnormal, the factors listed in Clauses (a) to (f) of this Section are all to be considered, and are all of importance" and that "[a]ny one of them is not necessarily sufficient of itself in a particular case, and ordinarily several of them will be required for strict liability." *Id.*, comment *f*.

An accurate and responsive applicant answer might plausibly make a good argument that each of the six factors cuts in favor of Pam, the plaintiff-client, as follows:

1. blasting in a residential suburb involves a high degree of risk of some harm to the person or property of others;
2. it is likely that any harm which results from such blasting will be great, as there are many expensive homes in the area;
3. as the present facts demonstrate, the exercise of reasonable care in blasting does not eliminate the risk;
4. blasting is not a matter of common usage because few people engage in that activity [see Restatement (Second) § 520, comment *i*];
5. blasting in a residential suburb is inappropriate to the place where it is carried on; and,
6. the value of such blasting is outweighed by its dangerous attributes.

In most states, including Colorado, the duty is owed only to "foreseeable plaintiff," that is, persons to whom a reasonable person would have foreseen a risk of harm under the circumstances. The Restatement suggests that two types of persons are disqualified from using strict liability in tort for an abnormally dangerous activity: (1) "one who intentionally or negligently trespasses on land for harm done to him by an abnormally dangerous activity that the possessor carries on upon the land," Restatement (Second) of Torts § 520B (1977) and (2) one who is harmed because he or she is carrying on an "abnormally sensitive" activity, *id.*, § 524A. Pam falls under neither category and is thus a proper plaintiff in the sense that she is entitled to use the theory of strict liability in tort for abnormally dangerous activity.

The Restatement provides that "[o]ne who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another *resulting from the activity*." *Id.*, § 519(1)(emphasis added). Pam must thus establish a cause-in-fact relationship between Contractor's blasting and the structural harm to her home, which clearly exists under the facts because "an unexpectedly-strong concussion from detonation by Contractor of the explosives on the adjoining lot *caused* serious structural harm to Pam's home."

Though Restatement (Second) § 519 imposes strict liability, that strict liability "is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous." *Id.*, § 519(2). This proximate cause requirement is easily satisfied because Pam, a next-door-neighbor, suffered concussion damage to her property, which is probably the primary or most likely kind of harm, the possibility of which makes blasting in a residential suburb abnormally dangerous.

The Restatement (Second) permits recovery for "harm to the person, land or chattels of another," *id.*, §519(1), which clearly reaches the "serious structural harm to Pam's home." The harm must result from the kind of danger to be anticipated from the abnormally dangerous activity, that is, it must flow from the "normally dangerous propensity" of the condition or thing involved. In other words, strict liability has been confined to the consequences which lie within the extraordinary risk whose existence calls for such special responsibility. *Walcott v. Total Petroleum, Inc.*, *supra*.



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Essay 6 GradeSheet

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- 1. Identification that strict liability in tort applies. 1. _____
- 1a. in cases where there are abnormally dangerous or
ultra-hazardous activities. 1a. _____

Three elements required in finding an activity to be ultrahazardous:

- 2. The activity must involve a risk of serious harm to persons or property; 2. _____
- 3. The activity must be one that cannot be performed without risk of serious
harm no matter how much care is taken; and 3. _____
- 4. The activity is not commonly engaged in by persons in the community. 4. _____

Discussion of Scope of Duty

- 5. Abnormally dangerous or ultra-hazardous activity carries with it an
absolute duty to make the activity safe to foreseeable plaintiffs. 5. _____
- 5a. Pam, living next to site, was a reasonably foreseeable plaintiff. 5a. _____
- 5b. damage from blasting was a reasonably foreseeable danger/risk. 5b. _____
- 6. Damages may be recovered for injuries caused by ultrahazardous activity. 6. _____
- 7. There were no intervening forces that would relieve Contractor of liability;
in other words, Contractor's acts were the direct and proximate cause of the
damage to Pam's house. 7. _____

QUESTION 5

Mary is employed by Copy-O's, an all-night photo-copying store which has several outlets in her city. Mary works long hours, including late night shifts. Last January, at about 3 a.m., while Mary was working, two men wearing ski masks and carrying guns burst through the front door of Copy-O's. They ran through the store cursing, screaming threats, and brandishing their guns. Mary, overwrought and near the end of her shift, started sobbing loudly. As a result, one of the men shook his gun at her and motioned for her to sit in a chair, whereupon he ordered her to "stay there and shut up." After the other employees were locked up in a small room, Mary, with a gun pointed at her, was escorted by the arm to the back room where the safe was kept and forced to open it.

After the two men departed, the head of Copy-O's security force, who was known to the employees, came into the store and explained to the stunned staff that the entire "robbery" was staged by Copy-O's security force. The staged robbery was done in response to robberies which had occurred at other Copy-O locations, and was an effort to teach employees how to properly react in these situations.

Mary now hates her job and claims to have recurring nightmares about the incident which disrupt her sleep.

QUESTION:

Discuss the potential causes of action in tort Mary might have against her employer. Do not discuss damages or defenses.

DISCUSSION FOR QUESTION 5

In considering Mary's potential tort causes of action against her employer, five possible bases sounding in tort are presented in the fact pattern. These are:

1. Assault;
2. Battery;
3. False Imprisonment;
4. Intentional infliction of severe emotional distress; and
5. Negligent infliction of emotional distress.

Each of these possible tort claims is discussed below.¹

Assault

The tort of assault is concerned with the duty to abstain from intentional injury to others. Intentional torts, such as assault and battery (discussed below), generally require that the actor *intended the consequences of the act*, and not simply the act itself. RESTATEMENT (SECOND) OF TORTS, Sect. 8A (comment)(emphasis added) (1965). The tort of assault generally protects a person's interest in freedom from apprehension of a harmful or offensive contact with the person accused of committing the tort. Assault is committed when: 1) a defendant acts, intending to cause a harmful or offensive contact with the person of the plaintiff or a third party, or an imminent apprehension of such contact, and 2) thereby puts the plaintiff in imminent apprehension of such contact. *Id.* at Sect. 21. Assault is also committed when there is an intent to cause an imminent apprehension of contact, even if no actual contact is intended by the defendant. *Id.* at Sect. 21(1); *Bohrer v. DeHart*, 943 P.2d 1220, *1224 (Colo. App. 1996), rev'd on other grounds, 961 P.2d 472 (Colo. 1998).

To constitute the tort of assault, generally some overt act is required, such as pointing a gun in a threatening manner. Although words and threats alone cannot constitute the tort of assault, when words are accompanied by a threat of physical violence, under conditions that indicate the present ability to carry out the threat, an assault may be committed. *Dahlin v. Fraser*, 288 N.W. 851 (Minn. 1939). The display of force must be such as to cause the plaintiff reasonable apprehension of imminent bodily harm. RESTATEMENT (SECOND) OF TORTS Sect. 21(2) (1965). Moreover, although courts typically look to the intent to cause contact or the apprehension of same, intent may be inferred from all of the facts and circumstances, including threats and gestures. *Dahlin v. Fraser*, 288 N.W. 851 (Minn. 1939).

In the present case, it is clear that Mary experienced threats of bodily harm. Also, because the "robbers" held guns and acted in a menacing manner, it was evident to Mary that they had the ability to carry the threat into effect. Mary, scared by all of the commotion, was clearly put in imminent apprehension of a harmful or offensive contact. Even though there was little actual contact, there was

¹ Although not a torts issue, examinees should discuss initially the threshold consideration regarding the action of the purported robbers in this staged robbery, and should at least mention that since the "robbers" were acting under the direction of and at the behest of the employer, principles of agency would apply and their actions would be imputed to the employer, thus allowing a suit against the employer to go forward.

clearly an intent to cause imminent apprehension of bodily harm. Further, the fact that the "robbers" were running around and threatening people would meet the standard that an overt act is required for assault. And, although the "robbers" took no affirmative action to harm Mary, because there was a threat of physical violence, along with the ability to carry out such a threat, most likely Mary would have a viable claim of assault against her employer.

Battery

The tort of battery recognizes an individual's interest in freedom from intentional and unpermitted contact. McCracken v. Sloan, 252 S.E. 2d 250 (N.C. App. 1979). Generally, a battery includes an act constituting an assault, and an assault is often an attempted battery. Stark v. Epler, 117 P. 276 (Or. 1911). A defendant will be found civilly liable for a battery for 1) directly or indirectly causing a harmful or offensive contact with the plaintiff by an act which was 2) intended to result in the harmful or offensive contact with the plaintiff, or intended to place the plaintiff in imminent apprehension of such contact. Hall v. McBryde By and Through McBryde, 919 P.2d 910, *912 (Colo. App. 1996); RESTATEMENT (SECOND) OF TORTS Sects. 13 (harmful conduct), 18(1) (offensive contact) (1965). Also, a defendant can be found liable for a harmful or offensive contact if the defendant's intent was to put the plaintiff or another in imminent apprehension of such contact. Id. at Sects. 13(a), 18(1)(a). The defendant's intent need not be hostile, since no proof of a hostile intent is required to make out a claim for battery. However, fear or shock alone may not be actionable. Id. at Sect. 15.

In the present case, Mary may have a harder time making out a claim for battery than for assault, simply because there appears to be no harmful or offensive contact. The intent required for battery can be met because clearly there was an intent to put Mary in imminent apprehension of harmful contact, and this is especially witnessed by the shouting and waving of weapons in the fact pattern. Mary will argue that the robber's act of taking her by the arm was offensive contact. Examinees may also argue that the tort of battery would lie because Mary was required to sit in a chair and also taken to the back room; however, neither of these acts, at least as stated in the facts, would probably be enough to make out a cause of action for battery. As noted above, however, Mary's fear or shock alone would probably not be actionable as battery.

False Imprisonment

The tort of false imprisonment is the unlawful violation of a person's right of personal liberty or the restraint of that person without legal authority. False imprisonment deprives a person of liberty of movement or freedom of choice to move about as one would wish. Bender v. Seattle, 664 P.2d 492 (Wash. 1983). False imprisonment requires the following elements: 1) that the defendant intended to restrict the plaintiff's freedom of movement; 2) that the plaintiff's freedom of movement was in fact restricted for a period of time, however short, either directly or indirectly by an act of the defendant; and 3) that the plaintiff was aware that her freedom of movement was restricted. RESTATEMENT (SECOND) OF TORTS Sect. 35 (1965); Goodboe v. Gabriella, 663 P. 2d 1051, 1056 (Colo. App. 1983). Such confinement need not be unlawful confinement to meet the requirements for this tort. See RESTATEMENT (SECOND) Sect. 118 (1965). Further, there have been some cases which have held

that employers can be held liable for false imprisonment of their employees, so long as the employee was held against her will, for an appreciable time, under threat of force. See, e.g., *Fermiro v. Fedco, Inc.*, 872 P.2d 559 (Cal. 1994) (court said that false imprisonment committed by an employer against an employee is almost always outside the scope of the compensation/employment bargain and therefore actionable).

In the present case, examinees should note that Mary was told to sit in a chair and to stay there by one of the "robbers." While the men continued to move about, Mary was forced to remain in the chair until she was taken to the back room where she opened the safe. Her movement was restricted by an act of the defendant for some period of time and she was aware of that restriction. Of course, we have very sketchy facts about the alleged "confinement," but from the facts as presented, it would appear that the prevention by the "robbers" of the liberty of movement against her will, and the intent to confine, all occurring with Mary's conscious awareness of the actions, would constitute valid grounds to support a cause of action for false imprisonment.

Intentional Infliction of Emotional Distress

It would appear that the facts support a claim for intentional infliction of emotional distress ("IIED"). The tort of IIED requires a showing that: 1) the defendant engaged in "extreme and outrageous" conduct, and 2) that the defendant intentionally caused the plaintiff severe emotional distress (or caused such distress with reckless disregard for the plaintiff's emotional state). *Keohane v. Stewart*, 882 P.2d 1293, 1311 (Colo. 1994); cert. denied, 513 U.S. 1127 (1995); RESTATEMENT (SECOND) OF TORTS sect. 46 (1965).

Here, the "robbers," by their outrageous and threatening actions, including the shouting of threats and the waving of weapons, intentionally caused severe emotional distress to Mary. The "robbers" specifically waved their guns around and shouted threats. This degree of outrageousness would seem to meet the standard for IIED as set forth in the Restatement. Further, the facts state that Mary is still having nightmares about the incident, and that she now hates her job. This was all caused by the actions of the "robbers" in the staged robbery at Copy-O's. Thus, it would appear that Mary could make out a viable claim for IIED against her employer.

Negligent Infliction of Emotional Distress

A prima facie case of negligence is established when the plaintiff proves the following elements: 1) the existence of a legal duty owed by the defendant to the plaintiff, 2) a breach of

that duty, 3) injury to the plaintiff, and 4) a causal relationship between the breach and the injury. Gerrity Oil & Gas Corp. v. Magness, 946 P.2d 913, 929 (Colo. 1997); See also Connes v. Molalla Transp. Sys. Inc., 831 P.2d 1316, 1320 (Colo. 1992). The question of whether defendant in negligence action owes plaintiff a legal duty of care is essentially one of fairness under contemporary standards; that is, whether reasonable persons would recognize and agree that a duty of care exists. Swieckowski by Swieckowski v. City of Fort Collins, 923 P.2d 208 (Colo. App. 1995), aff'd 934 P.2d 1380 (Colo. 1997). "A court's conclusion as to the existence of a duty is an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is [or is not] entitled to protection." W. Page Keeton, et al. *Prosser and Keeton on the Law of Torts* § 53, at 358 (5th ed. 1984). Several factors, including the risk involved, the foreseeability and likelihood of injury as weighed against the social utility of the defendant's conduct, the magnitude of the burden of guarding against the harm, and the consequences of placing this burden on the defendant are all relevant to a court's consideration of whether to recognize a duty in a particular case." Greenberg v. Perkins, 845 P.2d 530, 536 (Colo. 1993).

Here, Mary could argue that her employer had a duty to avoid exposing its employees to events such as the staged robbery that might emotionally traumatize them, and that the employer breached this duty by its conduct. In other words, a reasonable person might find that the employer acted inappropriately by subjecting Mary to a "test" involving armed robbers wearing masks making threats against her personal safety. Mary will have to argue that her nightmares and disrupted sleep constitute injury to her person and that these injuries were directly caused by the employer's negligent actions.



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1. Recognition that "robbers" were agents of the employer and that their actions would be imputed to the employer, thus allowing a suit against the employer to go forward. 1. _____

2. Identification of assault as potential claim. 2. _____
 - 2a. Elements of assault are: an act intending to cause offensive contact or imminent apprehension of such contact, thereby putting plaintiff in imminent apprehension of such contact. 2a. _____
 - 2b. Discussion of how facts support a claim of tort of assault. 2b. _____

3. Identification of battery as potential claim. 3. _____
 - 3a. Elements of battery are: act intending to cause offensive contact or imminent apprehension of such contact, which directly or indirectly causes a harmful or offensive contact. 3a. _____
 - 3b. Discussion of how facts support a claim of tort of battery. 3b. _____

4. Identification of false imprisonment as potential claim. 4. _____
 - 4a. Elements of false imprisonment are: defendant intended to restrict plaintiff's movement; plaintiff in fact was restricted; and, plaintiff was aware that her freedom of movement was restricted. 4a. _____
 - 4b. Discussion of how facts support a claim of tort of false imprisonment. 4b. _____

5. Identification of intentional infliction of emotional distress as potential claim. 5. _____
 - 5a. Elements of intentional infliction of emotional distress are: defendant engaged in "extreme and outrageous" conduct; and, defendant intentionally caused the plaintiff severe emotional distress. 5a. _____
 - 5b. Discussion of how facts support a claim of tort of intentional infliction of emotional distress. 5b. _____

QUESTION 2

Dog Owner lives in City which has a municipal ordinance that states, "Dog owners must keep their dogs on leashes at all times while in City parks."

Owner was walking her dog, on a leash, in a City park. Without warning, the dog lunged, broke the leash, ran after Plaintiff, and nipped Plaintiff in the hand, drawing blood. Owner took the dog to a veterinarian clinic after the park incident. She told a veterinarian at the clinic about the incident and left the dog at the clinic so that they could determine if the dog was rabid.

While confined at the clinic, and before the observation was completed, the dog escaped and was never found. Owner was not provided with an explanation of how the dog escaped. Unsure whether the dog was rabid, Plaintiff underwent treatment for rabies.

QUESTION:

Discuss the potential tort claims of Plaintiff against Owner, the clinic, and the manufacturer of the dog's leash, and any possible defenses to these claims.

- Do not discuss issues related to comparative negligence, contributory negligence, damage apportionment, or joint and several liability.

DISCUSSION FOR QUESTION 2

Liability of the Owner

The first issue as to Owner is whether she was negligent, either in restraining the dog or in not recapturing the dog before it bit plaintiff - or in entrusting custody of the dog to the Clinic. From all that appears, the breaking of the leash may have been an accident. "The occurrence of an accident does not raise any presumption of negligence" CJI-3d ed., §9:12.

The second issue as to Owner raises the doctrine of negligence per se. City has enacted a leash-law that requires a dog owner to keep her dog on a leash when the dog is in a City park. Violation of such a law may be negligence per se, if the plaintiff is within the statutory class to be protected. *Newport v. Moran*, 80 Or. App. 71, 721 P.2d 465 (1985). Presumably the Plaintiff would be within the class of persons to be protected by this law. Here, though, the leash-law required only that the dog be on a leash, and the facts state that Owner did have the dog on a leash; therefore, Owner was in compliance with the ordinance and was not negligent per se.

There is no indication that Owner knew or should have known her dog had a dangerous propensity to bite prior to the park incident. If Owner did have such knowledge, she would be under a heightened duty. Under the general rule, she would be strictly liable to Plaintiff. RESTATEMENT (SECOND) OF TORTS §509 (1977). Under Colorado Law, she would be under a duty of reasonable care to prevent injury or damage associated with any dangerous propensities, which the dog was known to have. CJI-3d ed., §13:1 and cases cited therein.

Liability of the Clinic

The first issue regarding a claim against the clinic is whether the clinic had a duty to Plaintiff. Here, the facts state that the clinic was aware of the reason why owner had the dog committed to the clinic's custody. Therefore, a duty arguably existed to Plaintiff.

The second issue regarding a claim against the clinic is whether the clinic was negligent in permitting the dog to escape. Again, the mere fact that the dog escaped is not adequate to establish negligence.

The third issue has to do with the possibility of a heightened duty. Whereas there is no indication that Owner had knowledge of the dog's propensity to bite at the time of the attack, the facts do state that a veterinarian at the clinic was told of the bite incident and therefore had knowledge of at least one bite incident. The clinic, although it was not the owner, was nevertheless the possessor of the dog since it was charged with the dog's custody. See RESTATEMENT (SECOND) OF TORTS §514 (1977).

Liability of the Manufacturer

A product manufacturer is generally held liable under either or both of two theories: (1) negligence in design or manufacture, and/or (2) strict liability. CJI-3d ed., § 14:1 and § 14:18. A manufacturer is strictly liable when an unreasonably dangerous defective product causes personal injury. RESTATEMENT (SECOND) OF TORTS §402A (1965). In order for liability to attach under either theory, the product must have been defective when it left the manufacturer's hands. *Id.* If the product failed from normal wear and tear, unforeseeable misuse or alteration, there is no liability under either theory.

Causation/Damages

The issue of causation arises since Plaintiff has suffered two distinct types of damages. First, he suffered damages related to the initial biting. Second, he suffered damages related to the escape of the dog, i.e., the rabies treatment. The examinee need not discuss this strictly in the context of "damages," but may also refer to this issue in the context of "causation." For example, the examinee may say that, here, two "separate," "distinct," or "non-concurrent" causes contributed to the Plaintiff's damages, or that here there was an "intervening" cause. The Owner and the Manufacturer, if liable, would each be liable for bite damages. The clinic, however, if liable, would not be responsible for bite damages, but would be liable for damages associated with the escape/rabies treatment.

A possible defense exists as to the Owner (and possibly the Manufacturer's) liability for damages related to the escape and rabies treatment since Owner can argue that she took reasonable steps to prevent such damages by entrusting the dog to clinic. This principle is outlined in Colorado law, at CJI-3d ed., §9:28, as follows:

One's conduct is not a cause of another's injuries, however, if, in order to bring about such injuries, it was necessary that his or her conduct combined with an intervening cause which also contributed to cause the injuries, but which intervening cause would not have been reasonably foreseen by a reasonably careful person under the same or similar circumstances.



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Essay 2 GradeSheet

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1. Issue of Owner's potential negligence in failing to restrain dog. 1. _____
2. Negligence requires: duty of care, breach of that duty, causation, and damages or injury 2. _____
3. Owner may be found negligent if leash found to be poorly maintained, improperly used, improperly selected, etc. 3. _____
4. Spotting basis for negligence other than leash (such as the way the dog was walked or brought under control). 4. _____
5. Identification of strict liability (heightened duty of care) based on knowledge of dog's dangerous propensity (or lack of such knowledge). 5. _____
6. Recognition that violation of ordinance is negligence per se. 6. _____
7. Issue of clinic's potential negligence in allowing dog to escape. 7. _____
8. Identification of issue regarding the existence of a duty by clinic to Plaintiff (not just Owner), given knowledge of bite. 8. _____
9. Owner may argue that she is not responsible for the escape damages, since she took reasonable steps to prevent such damages by entrusting the dog to clinic. (It was not reasonably foreseeable that her dog would escape.) (Intervening cause.) 9. _____
10. Manufacturer would be liable if the leash was defective when manufactured (but not if it failed thereafter because of normal wear and tear, unforeseeable misuse, or alteration). 10. _____
11. Plaintiff has two kinds of damages/injury : (1) related to the biting, and (2) related to the escape, including the rabies treatment. 11. _____
12. If liable, Owner (or Manufacturer) would be responsible for at least biting injury /damages. 12. _____
13. If liable, Clinic would be responsible for rabies treatment damages/injury only. 13. _____

QUESTION 9

Peter Plaintiff works in Metropolis City. His office is next to Big Corporation's national headquarters. Recently, Corporation acquired two portable defibrillators; electronic devices used to restore heart rhythm. Corporation acquired the defibrillators in response to prominent public health officials' recommendations that large institutions and businesses purchase them and train personnel to use them in the event of an emergency. Corporation sent out public service announcements publicizing the acquisition, and invited local reporters to attend a press conference displaying the defibrillators and discussing their use.

Last week, as Plaintiff was walking to work and was just outside Corporation's headquarters, he began experiencing sharp chest pains. Plaintiff thought that he might be having a heart attack. He remembered that Corporation had purchased the defibrillators and had the presence of mind to tell his companion before he passed out. Plaintiff's companion immediately took Plaintiff into Corporation's headquarters.

Corporation's first-aid personnel, who came to help Plaintiff, informed Plaintiff's companion that they no longer had the defibrillators. They had sent the defibrillators back to their manufacturer because both were malfunctioning. The first-aid personnel then called 911, and an ambulance arrived about ten minutes later. Unfortunately, Plaintiff could not be resuscitated and was pronounced dead upon arrival at the hospital. Cause of death was listed as Sudden Cardiac Arrest (SCA).

Evidence shows that about forty percent of all SCA victims who are defibrillated at hospitals survive. Evidence further shows that about fifteen percent of all SCA victims defibrillated outside hospitals survive. Only five percent survive without defibrillation.

QUESTION:

Discuss possible claims of negligence that Plaintiff's family may bring against Corporation.

DISCUSSION FOR QUESTION 9

This negligence question focuses on the applicant's knowledge of three special rules: the duty rules in cases of gratuitous undertakings (assumption of duty); the special causation rules for loss-of-chance; and the different elements of damage in wrongful death cases.

Generally, a *prima facie* case of negligence is established when the plaintiff proves the following elements: 1) the existence of a legal duty owed by the defendant to the plaintiff, 2) a breach of that duty, 3) injury to the plaintiff, and 4) a causal relationship between the breach and the injury. Gerrity Oil & Gas Corp. v. Magness, 946 P.2d 913, 929 (Colo. 1997); See also Connes v. Molalla Transp. Sys., Inc., 831 P.2d 1316, 1320 (Colo. 1992).

As a general rule, one is under no duty to aid others in peril. For one famous statement of this old common-law principle. See, Buch v. Amory Manufacturing Co., 44 A. 809 (N.H. 1897). There is, however, one recognized exception to this general rule. One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if: (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking. Restatement (Second) of Torts § 323 (1965). In other words, one who gratuitously acts for the benefit of another, although under no duty to do so in the first instance, once the undertaking begins, is then under a duty to act like an ordinary, reasonable, and prudent person and continue the assistance.

In these facts, Corporation publicly held out that it had two defibrillators, but it is not clear that they offered them to the public; it could be argued either way. Certainly, further factual investigation is necessary to determine whether Corporation assumed a duty to the public by its advertisement. Further factual investigation will also be necessary to determine whether Corporation failed "to exercise reasonable care to perform his undertaking." Would a reasonable corporation of ordinary prudence have done more? Perhaps it should have announced that its defibrillators were unavailable, to counter the effect of its prior publicity about their availability. Or perhaps it should have asked the manufacturer to borrow two replacement defibrillators to use during the period of repair of its original nonfunctioning defibrillators. These questions of negligence are almost always for the jury.

The facts show that Plaintiff relied on the public information about the defibrillators, however, it is necessary to show that "the harm is suffered *because of* the [plaintiff's] reliance upon the [Corporation's] undertaking." Restatement (Second) of Torts § 323(b). Even given Plaintiff's reliance, it is not clear that Corporation's negligence, if any, was the cause in fact of the harm. Corporation's negligence will have been a cause-in-fact only if, but for the negligence, the plaintiff would not have been harmed. The civil burden of proof requires that it must be more likely than not that had the Defendant not

DISCUSSION FOR QUESTION 9
Page Two

been negligent, the plaintiff would not have been harmed. See generally, John L. Diamond, Lawrence C. Levine, & M. Stuart Madden, Understanding Torts §§ 11.01, 11.02 (LEXIS Publishing 2000). Some courts apply this traditional but-for rule of causation to cases like this, and therefore hold against the Plaintiff. See, e.g., Cooper v. Sisters of Charity, Inc., 272 N.E.2d 97 (Ohio 1971). Here, if Corporation had announced that its defibrillators were no longer available, Plaintiff may have called an ambulance and gone directly to a hospital instead of going inside Corporation's headquarters. If Plaintiff had arrived at the hospital before dying, his chance of survival would have been increased by 25% (from 15% to 40%). Nevertheless, even if Corporation's defibrillators had been working, Plaintiff may have died anyway. If Corporation had obtained replacement defibrillators when it returned its nonfunctioning defibrillators, Plaintiff might have been defibrillated by Corporation's first-aid personnel. In this instance, Plaintiff's likelihood of survival would have been increased only 10% (from 5% to 15%).

Some jurisdictions allow the issue of causation in fact to go to the jury on any showing that the Corporation's negligence has significantly reduced the plaintiff's chances to survive. See, e.g., Herskovits v. Group Health Cooperative, 664 P.2d 474 (Wash. 1983) [allowing the case to go to the jury on evidence that the Corporation's late cancer diagnosis reduced the plaintiff's chance to survive from 39% to 25%. This is referred to as the "substantial factor" test. Other courts instruct the jury to apportion damages in proportion to the reduction in the plaintiff's chances to survive. See, Dan B. Dobbs, The Law of Torts, §178, at 436-437 (West Group 2000).

A cause in fact of the plaintiff's damages is also a proximate cause if it leads naturally to the plaintiff's damages, in a sequence not broken by efficient intervening causes. In general, considerations of proximate causation further judicial policies limiting the extent of possible liability for those harms which the conduct has actually caused. See generally, John L. Diamond, Lawrence C. Levine & M. Stuart Madden, Understanding Torts §§ 12.01, 12.02 (LEXIS Publishing 2000). Perhaps the single strongest test of proximate causation is the test of foreseeability: was the risk of this harm to plaintiff within the scope of risks, the foreseeability of which made this Corporation negligent? Marshall v. Nugent, 222 F.2d 604 (1st Cir. 1955). Intervening causes are among the major problems that raise issues of proximate causation, but generally if an intervening cause was foreseeable, it will not break the chain of proximate causation. (*I.e.*, it will not be a superseding cause.) Here, Proximate causation seem to be satisfied. Corporation, which publicly held out that it has defibrillators on the premises, had reason to foresee a request to use them, and be liable for resulting damages if they are absent or are nonfunctioning.

Wrongful Death Damages

There are several patterns of recovery for death damages, most of them falling into

DISCUSSION FOR QUESTION 9
Page Three

one of two large groups - wrongful death acts and survival acts. Almost all states have some kind of wrongful death act, compensating the decedent's closest relatives for the economic support (and sometimes personal support) which they lost when the decedent died. Many states also permit the survival of any tort claim which the decedent could have brought at the moment of death, but usually only those related to an intangible personal interest survive (e.g. defamation). See generally, Dan B. Dobbs, The Law of Torts, ch. 19, at 803-820 (West Group 2000).



21741

Essay 9 GradeSheet

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and write numbers clearly

1. Elements of prima facie claim of negligence:
 - 1a. existence of a legal duty owed by the defendant to the plaintiff; 1a. _____
 - 1b. breach of that duty; 1b. _____
 - 1c. injury to the plaintiff; and 1c. _____
 - 1d. causal relationship between the breach and the injury. 1d. _____
2. A person is under no duty to come to the aid another in peril. 2. _____
3. Once a person has gratuitously acted for the benefit of another, however, he/she is required to continue to act without negligence. 3. _____
 - 3a. Because Corporation publicly held out that it had defibrillators, it may have assumed responsibilities under this exception. 3a. _____
4. Corporation's act (or failure to act) must be the cause *in fact* of the injury; that is, *but for* the Corporation's negligence, Plaintiff would not have been harmed. 4. _____
5. In addition to being the cause in fact of Plaintiff's injury, to hold Corporation liable, it must be demonstrated that Corporation's conduct was the *proximate cause* of that injury (*foreseeability*). 5. _____
6. Claims of Plaintiff's family will be based on wrongful death statutes unless a survival act allows for continuation of Plaintiff's claims. 6. _____

QUESTION 3

Value House Motels, Inc. owns a motel in the City of Utopia, State of Superior. A year ago, the general manager of the motel resigned, and Value House began a statewide search for a replacement. David Doolittle, who is 50 years old, applied for the position. In the application for employment Doolittle was asked if he was ever fired from any job; he answered "no." He also stated that he had not been convicted of any crimes. In fact, Doolittle, when he was 25 years old, had been fired from a restaurant in Utopia where he had been accused of theft. In addition, he had two misdemeanor shoplifting convictions during the past two years.

The management of Value House interviewed Doolittle for the manager position. After the interview, Value House contacted Doolittle's most recent employer, another motel in Utopia where Doolittle had been an assistant manager. When asked about Doolittle, his former employer informed Value House that Doolittle was prompt, clean, and courteous. Value House did not inquire further and hired Doolittle.

One month ago, when Doolittle was filling in as night clerk at the motel, he checked in a customer, Paul Petit. When Petit opened his briefcase to retrieve his checkbook, Doolittle noticed a stack of \$100 bills. Later, when Doolittle was leaving work, he saw Petit walk to his car carrying his briefcase. He followed Petit's car to a local restaurant and while Petit was in the restaurant, Doolittle broke into the car and stole the cash. Doolittle was observed on a surveillance camera breaking into Petit's car and taking the money.

QUESTION:

Discuss Value House Motels' liability for the stolen cash, and any defense(s) Value House might have.

DISCUSSION FOR QUESTION 3

Value House Motels, Inc. might be liable under one of two theories of agency law.

Respondeat Superior

As a general rule, an employer is liable for the conduct of a servant acting within the scope of the servant's employment. *Restatement (Second) of Agency, Sec. 228(1)*. To be within the scope of employment, the *Restatement* provides the conduct must be of the same general nature as that authorized or incidental to the conduct authorized. *Restatement (Second) of Agency, Sec. 228(1)*. The issue in this case was whether the theft of the briefcase was within the scope of employment.

The following factors are relevant.

1. Is the conduct commonly done by the servant? *Restatement (Second) of Agency, Sec. 229(2)(a)*. Theft off the premises is probably not common.
2. The time, place, purpose of the act. *Restatement (Second) of Agency, Sec. 229(b)*. The act was committed after work hours, off premises, and not with the purpose of aiding the employer.
3. Whether or not the master has reason to expect the act will be done. *Restatement (Second) of Agency, Sec. 229(2)(f)*. Here the act is probably not foreseeable, though it could be argued that in a motel business, a certain amount of theft often occurs.
4. Whether or not the act is seriously criminal. *Restatement (Second) of Agency, Sec. 228(1)*. In this case, the act was criminal. Considering the facts and circumstances, however, the theft was probably not within the scope of the employment. Value House could defend on the grounds that Doolittle was on a lark, outside the scope of employment.

Negligent Hiring.

The *Restatement (Second) of Agency* states: "A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless in the employment of improper persons or instrumentalities in work involving risk of harm to others." *Id.* Sec. 213 (b). Risk of harm includes risk of theft. See, e.g. *Welsh Manufacturing v. Pinkerton's, Inc.*, 474 A.2d 436 (R.I. 1984).

Value House Motels, Inc. may have acted negligently in two regards First, Value House failed to check Doolittle's criminal record. A check of the criminal record probably would have revealed the two shoplifting convictions. *Id.* at 442. Second, Value House should have asked the recent reference about Doolittle's character. *Id.* It is not enough to ask about punctuality, appearance, and courtesy. Value House, though, cannot be faulted for not checking an employer Doolittle worked for 25 years ago.

Value House should argue that the general operation of a motel does not involve particular risk of harm to others. Petit will reply that because customers entrust their personal safety and property to the motel, "it should have been foreseeable that the hired individual posed a threat of injury to others." *Ponticus v. K.M.S. Investments*, 331 N.W. 907, 911, (Minn. 1983).



21382

Essay 3 GradeSheet

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and write numbers clearly

1. An employer is liable for employee's torts committed within the scope of employee's employment. (Respondent Superior or Vicarious Liability). 1. _____
2. Relevant Factors are:
 - 2a. Is the conduct commonly done by servant (Scope of Employment); 2a. _____
 - 2b. Was the conduct within authorized time and space limits of employment? (or frolic or detour) 2b. _____
3. Employers can be liable for an employee's conduct if they negligently hire an employee. 3. _____
4. Hotels, like common carriers, have a higher standard of care to their guests or general operation of a motel does not involve particular risk of harm to others. 4. _____
5. Value could be liable for putting an unsuitable Employee in a position to harm customers and such harm was foreseeable. 5. _____
6. Value could be found to be negligent in failing to check criminal reference or to ask further into character reference. 6. _____
7. However, Value House's negligence has to be the proximate cause of the damages suffered by Petit. 7. _____
8. Value House has the defense of comparative/contributory negligence by David. 8. _____
9. Criminal activity is a relevant factor to determine scope of employment and can be used as a defense by Value. 9. _____

QUESTION 5

The Aspens and the Boulders were feuding next-door neighbors. One evening while on his second story deck, Mr. Boulder aimed his rifle into the Aspens' backyard and shot the Aspens' faithful and beloved dog Durango.

The next morning, Mrs. Aspen encountered Mrs. Boulder in the grocery store. Mrs. Aspen grabbed a can of caviar, yelled "you're going to pay for your husband's actions," and then threw the can at Mrs. Boulder. Mrs. Boulder saw Mrs. Aspen throw the can and ducked. The can missed Mrs. Boulder but hit a grocery clerk who had not seen it coming.

Upon hearing of the grocery store incident, Mr. Boulder retaliated by using a telephoto lens to take several photographs of Mrs. Aspen in the shower. Mr. Boulder posted the photographs on a web site along with Mrs. Aspen's name and address.

QUESTION:

Discuss the viable civil causes of action that can be brought based on these facts.

DISCUSSION FOR QUESTION 5

Mr. Boulder committed a trespass by intentionally causing a physical invasion of the Aspens' land. See Restatement (Second) of Torts, § 158 (1965). The act of firing a bullet that entered the Aspens' property was sufficient to constitute a physical invasion. See Public Service Co. of Colorado v. Van Wyk, 27 P.3d 377, 389 (Colo. 2001)(by intentionally entering the land possessed by someone else, or causing a thing or third person to enter the land, an individual becomes subject to liability for trespass).

Mr. Boulder's act of shooting Durango also constituted either a trespass to chattel/personal property or conversion. Trespass to chattels requires an intentional act that dispossesses plaintiff of his or her possessory interest in a chattel or interferes with such interest. See Restatement (Second) of Torts § 217 (1965). Conversion requires intentional interference with the plaintiff's right to possession that is so substantial that the actor should be required to pay for the property's full value. See Restatement (Second) of Torts § 222A (1965). Here, the facts do not state whether Durango was killed by the shooting or, instead, was merely injured and recovered. That missing information would help determine whether Mr. Boulder's liability would be for conversion or trespass to chattels. The applicant should receive credit for discussing either tort and should receive additional credit for discussing both.

The act of shooting Durango may also have constituted intentional infliction of emotional distress. That tort requires extreme/outrageous conduct which intentionally or recklessly causes severe emotional distress. See Restatement (Second) of Torts § 46 (1965). Although courts have split on whether the intentional killing or injuring of a pet can form the basis for recovery, see Recovery of Damages for Emotional Distress Due to Treatment of Pets and Animals, 91 A.L.R.5th 545 (2001), the applicant should receive a point for discussing the possibility of succeeding under this theory.

Mrs. Aspen committed an assault against Mrs. Boulder. A defendant commits an assault by intentionally causing of a reasonable apprehension of immediate harmful or offensive contact. See Restatement (Second) of Torts § 21 (1965). Here, by yelling at Mrs. Boulder while throwing the can towards her, Mrs. Aspen intentionally caused a reasonable apprehension of a harmful/offensive contact.

Mrs. Aspen also committed a battery on the grocery clerk. Battery is the intentional causing of a harmful or offensive contact. See Restatement (Second) of Torts §§ 13, 18 (1965). Although Mrs. Aspen did not intend to hit the clerk, based upon the doctrine of transferred intent, Mrs. Aspen's intent to assault or batter Mrs. Boulder is sufficient.

By taking the photographs of Mrs. Aspen and then publishing them, Mr. Boulder committed an invasion of Mrs. Aspen's right of privacy by publicly disclosing private facts about her. In order to prevail on such a claim, a plaintiff must prove that (1) the facts or materials disclosed were private in nature; (2) the disclosure was made to the public; (3) the disclosure was one which would be highly offensive to a reasonable person; (4) the facts or materials disclosed were not of legitimate concern to the public. See Restatement (Second) of Torts § 652D; see also Robert C. Ozer, P.C. v. Borquez, 940 P.2d 371, 377 (Colo. 1997). Here, the shower photographs were clearly private, the posting of the photographs on the internet constituted public disclosure, a reasonable person would consider the disclosures highly offensive, and there was no legitimate public concern for the disclosure. The elements are satisfied.

Finally, the applicant should receive credit for arguing that Mr. Boulder's conduct of taking and publishing the photographs could also constitute intentional infliction of emotional distress. (See definition above)

ESSAY Q5

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ISSUE

	YES	NO
1. Mr. Boulder committed a trespass to land when he shot Durango.	1. <input type="radio"/>	<input type="radio"/>
1a. Discussion of elements of trespass (physical invasion, intent, causation)	1a. <input type="radio"/>	<input type="radio"/>
2. Mr. Boulder is possibly liable for trespass to chattel/personal property.	2. <input type="radio"/>	<input type="radio"/>
2a. Elements (intentional act, dispossession or interference with possessory interest)	2a. <input type="radio"/>	<input type="radio"/>
3. Mr. Boulder is possibly liable for conversion.	3. <input type="radio"/>	<input type="radio"/>
3a. Elements (intentional interference with possessory rights so serious/permanent as to require payment for full value)	3a. <input type="radio"/>	<input type="radio"/>
4. Mr. Boulder may be liable for intentional infliction of emotional distress.	4. <input type="radio"/>	<input type="radio"/>
4a. Discussion of elements (extreme/outrageous conduct, intent to cause severe emotional distress, resulting severe emotional distress)	4a. <input type="radio"/>	<input type="radio"/>
5. Mrs. Aspen committed an assault on Mrs. Boulder.	5. <input type="radio"/>	<input type="radio"/>
5a. Elements of assault (act causing reasonable apprehension, intent, causation)	5a. <input type="radio"/>	<input type="radio"/>
6. Mrs. Aspen committed a battery on the clerk.	6. <input type="radio"/>	<input type="radio"/>
6a. Elements of battery (intentional causing a harmful or offensive contact)	6a. <input type="radio"/>	<input type="radio"/>
6b. Discussion of transferred intent.	6b. <input type="radio"/>	<input type="radio"/>
7. Mr. Boulder is liable to Mrs. Aspen for violating her right to privacy.	7. <input type="radio"/>	<input type="radio"/>
7a. Identification of intrusion upon seclusion; or	7a. <input type="radio"/>	<input type="radio"/>
7b. Identification of public disclosure of private facts.	7b. <input type="radio"/>	<input type="radio"/>
8. Recognition that Mr. Boulder's conduct could create liability for intentional infliction of emotional distress.	8. <input type="radio"/>	<input type="radio"/>

QUESTION 8

Andrea Apprentice recently moved to Metropolis and began working for real estate tycoon Donald Defendant. During a meeting one afternoon, Defendant caught Apprentice surfing on her computer. Defendant became extremely angry with Apprentice, as Defendant strictly prohibits employees from working on their computers during his meetings. He ordered Apprentice to leave the meeting, go directly to her office, and stay there until Defendant came to talk to her. Defendant had been known to fire persons for similar rules infractions. Apprentice was so flustered and embarrassed that when she left the meeting, she not only forgot to take her laptop, but also her purse which contained both her wallet and her car keys.

Apprentice went to her office and waited, as told, for Defendant. She knew that Defendant always left the office at 6:00 pm each evening. However, unbeknownst to Apprentice, Defendant received an emergency telephone call at 5:00 pm informing him that an important deal was about to fall through, and he was needed right away. Defendant left the building shortly thereafter and did not return that evening.

At 8:00 p.m., Defendant suddenly remembered that he had left Apprentice waiting in her office. Defendant decided he could not be bothered to call Apprentice and didn't give it another thought.

Apprentice remained in her office until 10:00 pm, at which time she decided to go home. She went back to the meeting room to retrieve her purse and laptop, but the door was locked and she could find no one to unlock it for her. Because she didn't have her wallet or car keys, Apprentice spent the night at the office.

QUESTION:

Discuss the elements required to establish a claim for false imprisonment and whether Apprentice might successfully assert such a claim against Defendant.

DISCUSSION FOR QUESTION 8

For the plaintiff to have a good *prima facie* false imprisonment claim, she must show three elements: (1) An act or omission on the part of the defendant that confines or restrains the plaintiff to a bounded area; (2) Intent on the part of the defendant to confine the plaintiff to a bounded area; and (3) Causation. There is no requirement that the plaintiff show damages.

Did Defendant Confine or Restrain Apprentice?

Confinement legally means approximately what it does in ordinary speech: restriction to a relatively discrete area, bounded on all sides, of the defendant's choosing. *Bird v. Jones*, 7 Ad. & El. 742, 115 Eng. Rep. 668 (1845). Confinement or restraint can be shown by any of the following: physical barriers, physical force, direct threats of force, indirect threats of force, failure to provide means of escape and invalid use of legal authority. Plaintiff must be forced to choose between injury to herself or her property and her freedom of motion. Moral pressure or threats of future action are not sufficient.

In this case, Apprentice may argue that Defendant's conduct was threatening and that she felt forced to remain in her office. However, there are no facts indicating that Defendant threatened to physically harm either Apprentice or her property. Defendant's threat was that of terminating Apprentice's employment. This threat of future action is insufficient to establish this element of the *prima facie* case.

Intent and Causation to Confine Apprentice.

There are two alternative legal definitions of the requisite intent in false imprisonment: 1) the plaintiff must show that it was the defendant's purpose to cause the plaintiff's confinement, or 2) plaintiff must show that the defendant knew that the plaintiff's confinement was substantially certain to result from the defendant's conduct. RESTATEMENT (SECOND) OF TORTS §§ 8A, 35 (1965).

In this case, Defendant explicitly told Apprentice that she was to remain in her office, so it could be argued that Defendant had the purpose to confine Apprentice for at least a limited amount of time. Apprentice also could argue that Defendant had the intent to confine her to the office as he knowingly left her there. Thus, Apprentice would have a good argument that sufficient causation exists.

Conclusion

While Apprentice might be able to establish intent and causation, she can't establish that she was actually confined or restrained. Apprentice was not 'bound' in her office, the door was not locked. Plaintiff's fear of termination was insufficient to establish confinement, nor was the fact that her belongings were locked in the meeting room. A reasonable person in Apprentice's position would not have felt as though she or her possessions were at risk of injury if she ignored Defendant's instructions to remain in her office. Further, a reasonable person in Apprentice's

DISCUSSION FOR QUESTION 8

Page Two

position would have called a taxi or found another means of getting home and would not have felt forced to remain in the office overnight. Apprentice does not have a valid claim for false imprisonment against Defendant.

ESSAY Q8

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<u>ISSUE</u>	<u>POINTS AWARDED</u>
1. Elements of prima facie case: Act or omission to act that confines or restrains person to a bounded area; intent to confine; and causation. (identify all)	1. ○
2. Confinement/restraint shown by: physical barriers or force; or by failure to provide means of escape.	2. ○
3. Moral pressure and future threats not enough.	3. ○
4. Person must be forced to choose between injury to her person or property, and her freedom of motion.	4. ○
5. Apprentice could reasonably have found Defendant's behavior threatening, however, there were no actual threats of physical violence, only of possible termination, a future action which is not enough to establish this element.	5. ○
6. Apprentice's belongings were left in the conference room, but there is no indication that, if she left her office, Defendant would destroy or harm them.	6. ○
7. A 'bounded area' is a place where freedom of movement in all directions is limited.	7. ○
8. No facts indicating that the door was locked preventing her from leaving, not a bounded area.	8. ○
9. Intent: must show either that it was Defendant's purpose to cause her confinement, or must show that Defendant knew that her confinement was substantially certain to result from his conduct.	9. ○
10. Causation: confinement must have been legally caused by Defendant's action or inaction.	10. ○
11. Defendant intended Apprentice to remain in her office as shown by his order to go to her office and/or by failing to call her later that evening.	11. ○
12. No requirement of damages.	12. ○
13. Apprentice is not likely to succeed in a claim against defendant for false imprisonment.	13. ○

QUESTION 5

MegaHome hardware store recently contracted with an independent company called Squeaky Clean to maintain the front entryway of its store during winter months. At 1:00 p.m. on a particularly cold and snowy February day, a customer, Paul, approached the front entryway of MegaHome and slipped on a large patch of ice which caused him to fall and break his leg. Four hours earlier that day, when MegaHome first opened at 9 a.m., Larry, an employee of Squeaky Clean, removed all the snow from the front entryway and applied an ice melting compound. Over the next three hours, Larry did not check the entryway or take any further action to make it safe. At noon, approximately one hour before Paul slipped, Larry saw the large ice patch and placed a small sign approximately twenty-five feet away that read "Caution."

Paul was so angry after he slipped that he threw his car keys at Larry intending to hit him. The keys flew past Larry and caused a minor crack in a glass lamp which another customer, Maggie, had just purchased and was holding under her arm. Maggie did not see Paul throw the keys, as she was looking in the opposite direction when they struck the lamp.

QUESTIONS:

1. Discuss any viable claim(s) that Paul might have against MegaHome.
2. Discuss any viable claim(s) that Maggie might have against Paul.

DISCUSSION FOR QUESTION 5

Paul's claims against MegaHome

Paul will have a valid claim of negligence against MegaHome. In order to recover on a claim of negligence, a plaintiff must establish: (1) the existence of a legal duty to the plaintiff; (2) the defendant breached that duty; (3) the breach of duty caused the plaintiff injury; and (4) damages. See Keller v. Koca, 111 P.3d 445 (Colo. 2005); see also Restatement (Second) of Torts, " 281, 328A.

Here, although MegaHome hired an independent contractor to clear its front entryway, MegaHome cannot delegate its duty to keep its premises safe for its customers. See Kidwell v. K-Mart Corp., 942 P.2d 1280 (Colo. App.1996)(obligation of landowner in possession of property to maintain premises in safe condition for invitees may not be delegated to independent contractor); Restatement (Second) of Torts, ' 422. Thus, MegaHome owed Paul a legal duty. Because Paul was a customer or business visitor, MegaHome's duty toward Paul was that of an invitee. See Restatement (Second) of Torts, ' 332. A landowner's duty to an invitee includes the duty to warn the invitee of known dangerous conditions and a duty to make reasonable inspection of the premises to discover dangerous conditions and make them safe. The duty to make a condition safe may be satisfied by a reasonable warning. See Benham v. King, 700 N.W.2d 314 (Iowa 2005)(invitee owes duty to exercise reasonable care to determine actual condition of premises, and if dangerous condition is discovered, invitees owes further duty to make premises reasonably safe or warn of the condition and risk); Restatement (Second) of Torts, ' 343. Some states no longer distinguish between invitees, licensees and trespassers and simply use a reasonable person standard. See Dan B. Dobbs, The Law of Torts, pp. 615-620 (2000). Examinees should receive credit for noting this trend.

MegaHome breached its duty to Paul. Despite the fact that Larry initially took reasonable steps to make sure the entryway was clear, he thereafter failed to take any additional measures to clear the area during what the facts describe as a period of extremely cold and snowy weather. And, although Larry eventually noticed the patch of ice, his act of placing a *small* sign a long distance (twenty-five feet) away from the dangerous condition that simply stated *Caution* was probably insufficient to render the dangerous condition safe or to reasonably warn Paul of its true nature, character, or risk.

Because the remaining elements of proximate causation and damages are also satisfied, Paul appears to have a valid negligence claim against MegaHome.

Maggie's claims against Paul

Maggie has viable claims against Paul for battery and trespass to chattels.

1. Battery

Battery is defined as an intentional harmful or offensive contact to the plaintiff's person.

See Restatement (Second) of Torts, " 13, 18. The *plaintiff's person* may include anything closely connected to the person such as a purse or cane. See William L. Prosser, Law of Torts, p.34 (4th Ed. 1971); Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627 (Tex. 1967).

Here, the lamp which Maggie was *holding under her arm* was sufficiently attached or connected to her person such that contact with the lamp could be deemed contact with her. Furthermore, although Paul did not intend to hit Maggie with the keys, his intent to hit Larry transfers and is sufficient to complete the tort. See Restatement (Second) of Torts, 16(2), 20(2).

2. Trespass to Chattels

The tort of trespass to chattels requires an intentional act that causes interference with the plaintiff's right of possession of a chattel though either dispossession or intermeddling. See Restatement (Second) of Torts, 217. Damage to the chattel will satisfy the requirement of interference/intermeddling. (Id.)

The facts indicate that Paul's keys caused a minor crack in the lamp. This should constitute sufficient damage. The doctrine of transferred intent also applies to this intentional tort. Thus, Paul's intent to commit an assault or a battery against Larry will transfer to satisfy the intent requirement for trespass to chattels.

Finally, Maggie cannot recover for conversion both because the damage to the lamp is relatively minor and because Paul's intent to commit an assault/battery on Larry does not transfer to satisfy the intent requirement for conversion).

ESSAY Q5

SEAT

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ISSUE

POINTS
AWARDED

Paul v. MegaHome

- | | | |
|--|-----|-----------------------|
| 1. General elements of negligence (duty, breach, prox. cause, damages). (Need three out of four elements.) | 1. | <input type="radio"/> |
| 2. General rule that party is not liable for negligence of independent contractor. | 2. | <input type="radio"/> |
| 3. MH's duty not delegable by hiring independent contractor. | 3. | <input type="radio"/> |
| 4. MH's duty toward P was that of invitee. | 4. | <input type="radio"/> |
| 5. Description of duty to invitee (must include duty to inspect). | 5. | <input type="radio"/> |
| 6. MH breached duty to P because | 6. | <input type="radio"/> |
| 6a. generally failed to take further action to keep area clear after store opening; | 6a. | <input type="radio"/> |
| 6b. sign was insufficient (too small, too far away, not sufficiently descriptive). | 6b. | <input type="radio"/> |
| 7. Proximate causation satisfied. | 7. | <input type="radio"/> |
| 8. Damages satisfied. | 8. | <input type="radio"/> |

Maggie v. Paul

- | | | |
|---|-----|-----------------------|
| 9. P committed a battery on M. | 9. | <input type="radio"/> |
| 10. Definition of battery (intentional causing a harmful or offensive contact). | 10. | <input type="radio"/> |
| 11. Lamp qualifies as closely connected item. | 11. | <input type="radio"/> |
| 12. Transferred intent applies (either battery or trespass to chattels). | 12. | <input type="radio"/> |
| 13. P committed trespass to chattels. | 13. | <input type="radio"/> |
| 14. Definition of trespass to chattels (intentional interference with right to possession). | 14. | <input type="radio"/> |
| 15. Minor crack constitutes sufficient damage/interference. | 15. | <input type="radio"/> |

QUESTION 4

Homeowner called the fire department to request aid in getting her cat out of a tree. The department sent a volunteer fireman (Fireman) who with the aid of an aerial ladder was able to reach the cat. Grabbing the cat by the scruff of its neck, Fireman began to descend the ladder.

As Fireman was descending, Homeowner's 10-year-old child intentionally pushed over a beehive in Homeowner's backyard. The angry bees attacked and stung Fireman. Fireman was very allergic to bee stings and went into anaphylactic shock. Fireman dropped the cat, which fell to its death. As Fireman sought to prevent himself from falling, he grabbed a limb of the tree. The limb, which was rotten, broke and Fireman fell to the ground breaking a leg.

QUESTION:

Discuss the potential tort claims of Fireman against Homeowner, Fireman against Homeowner's child, and Homeowner against Fireman. Also, discuss any defenses the parties may have.

DISCUSSION FOR QUESTION 4

Fireman Against Homeowner

A. Potential claims

Fireman may claim that Homeowner was negligent. Many courts, however, hold that a landowner owes no duty of care to a fireman, who is deemed as a matter of law to assume the risks incidental to his role as a fireman. *Day v. Caslowitz*, 713 A.2d 758 (R. I. 1998). This rule has been applied to voluntary firemen. *Flowers v. Rock Creek Terrace Ltd.*, 520 A.2d 361 (Md. 1987). Under such a rule Homeowner would not be liable for her negligence, if any, in allowing the cat to climb the tree.

The rotten limb, however, is another matter. This appears to be a latent defect, not fairly associated with the fireman's mission, to which the fireman's rule would not apply. *Flowers v. Rock Creek Terrace, Ltd.*, *supra*. In order to recover in negligence, Fireman would have to show that Homeowner knew or should have known about the rotten limb and did not take reasonable precautions to prevent Fireman's injury therefrom. Dobbs, THE LAW OF TORTS § 231 (2000).

Other jurisdictions, however, have abolished the fireman's rule, and have imposed a general duty of care on the landowner to protect the fireman. *Day v. Caslowitz*, *supra*.

Parents are generally not held vicariously liable for the torts of their children. Phillips *et al.*, TORT LAW 46 (2d edition 1997). A parent may be negligent in failing to supervise his/her child, or in failing to protect others against known dangerous propensities of the child. Restatement (Second) of Torts § 316 (1965). In addition, some states, by statute, hold parents to limited amounts of liability for the intentional torts of their children. *See, e.g.*, Tenn. Code Annot. § 37-10-101. Thus, Homeowner could be liable to Fireman for damages from the broken leg, and also for damages from the anaphylactic shock if she is responsible for the act of her child.

B. Homeowner's Defenses

Homeowner may allege that Fireman was contributorily negligent, or comparatively at fault. There is no evidence, however, that Fireman was negligent in not discovering the rotten limb, and his falling may be excused under the sudden emergency doctrine owing to the bee stings. *Raimondo v. Harding*, 341 N.Y.S. 2d 679 (App. Div. 1973).

Fireman Against Child

A. Potential Claims

Fireman would claim that child is guilty of the intentional tort of battery in knocking over the beehive. A prima facie case of battery is proven when an intentional act by a defendant causes harmful or offensive contact to a plaintiff. Additionally, there must be causation, either

direct or indirect contact will suffice. Here, the contact is indirect, as the child set the bees in motion and they caused the harmful contact.

B. Child's defenses

The child will likely plead the fireman's rule, but this defense will be ineffective both because of the latent danger rule, discussed above, and because the fireman's rule is generally held not to apply to the commission of intentional torts. *Flowers v. Rock Creek Terrace, Ltd., supra.*

Child may also plead his minority. This is not a bar to recovery for the commission of an intentional tort, if a child of like age, intelligence and experience is capable of forming the requisite intent to commit the tort. *Goss v. Allen*, 360 A.2d 388 (N.J. 1976). A jury could find a child ten years of age capable of forming such an intent. *Id.*

Knocking over a beehive might be considered an adult activity, since it is one not normally engaged in by children and one involving a great risk of danger. *Robinson v. Lindsay*, 598 P.2d 392 (Wash. 1979). If the activity were considered an adult activity, Homeowner's child would be held to the standard of a reasonable adult. *Id.*

Homeowner's child may contend the danger to Fireman was not foreseeable. The validity of such a defense would depend on whether the child would reasonably foresee that the bees might escape and sting someone in the vicinity.

The bee sting could be seen as an injury resulting from transferred intent, in which event the issue of foreseeability would be immaterial. *Corn v. Sheppard*, 229 N.W. 869 (Minn. 1930). Homeowner's child committed a trespass to personalty or realty (depending on how the beehive is characterized), and the intent to commit this tort could be transferred to the battery of Fireman by the bees, which the child set in motion.

If Child is liable for the bee stings, he should also be liable for Fireman's injuries from the fall. The general risk of a fall under these circumstances is foreseeable, and the contributing factor of the rotten limb is merely a substantial contributing cause. *Landers v. East Texas Salt Water Disposal Co.*, 248 S.W.2d 731 (Tex. 1952). If Fireman is liable for the death of the cat, the child may be required to provide contribution or indemnity.

For the reasons already discussed, Fireman's comparative fault should not be a defense. Moreover, comparative fault, if any, is generally not considered to mitigate liability for an intentional tort. *Graves v. Graves*, 531 So. 2d 817 (Miss. 1988).

Homeowner Against Fireman

Homeowner could claim Fireman was negligent in grabbing the cat insecurely, i.e., by the scruff of the neck. It is not clear that this way of grabbing the cat was negligent, since cats are frequently carried securely and safely by the scruff of their necks. In any event, even if this method of transportation were negligent, this negligence was superseded by the unexpected, superseding bee stings and the breaking rotten limb.

ESSAY Q4

SEAT

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ISSUE

POINTS
AWARDED

1. Elements of Negligence are:
 - 1a. Existence of duty of care, 1a.
 - 1b. Breach of duty of care; and, 1b.
 - 1c. Damages. 1c.
2. H may be liable to F for negligent supervision of her child, C. 2.
3. Claims against child include negligence, battery or other intentional torts. 3.
4. H could be liable to F for damages arising from the sting and/or fall. 4.
5. For H to recover from F for loss of her cat, H must prove that F was negligent in not meeting the duty of care in handling the cat. 5.
6. Fireman's defenses could include comparative negligence and/or contributory negligence (H's failing to maintain the tree and C's destruction of the beehive). 6.
7. H has affirmative defenses, including:
 - 7a. There is no vicarious liability for intentional torts of children 7a.
 - 7b. That because of Fireman's Rule H had no duty of care. 7b.
8. Child's defenses include that while purposefully knocking over the beehive, C did not intend to cause harm to F. 8.

QUESTION 6

Molly, a minor, skied down a difficult slope at Ski Mountain. Because the slope proved to be too difficult for Molly's level of skill, she lost control and ran into a packed snow-retention barrier. Molly suffered severe injuries as a result.

Peter, who was employed on Ski Mountain's ski patrol, went to Molly's aid. In hauling Molly down the mountain in a sled, Peter slipped and fell injuring himself and further injuring Molly.

QUESTION:

Discuss the tort claims Molly may have against Ski Mountain and that Peter may have against Molly. Also discuss any defenses to the claims.

DISCUSSION FOR QUESTION 6

Molly Against Ski Mountain

Molly will assert two claims against Ski Mountain, one based on negligence in maintaining the retaining barrier and the other based on negligence of Peter in rescuing her. Ski Mountain will claim the defense of assumption of the risk regarding the barrier. Ski Mountain also will claim no negligence, or in the alternative contributory negligence, on the part of Molly. Molly will assert that Ski Mountain is responsible for the actions of Peter under the doctrine of *Respondeat Superior*. Ski Mountain and Peter had the relationship of employer-employee, and Peter was acting in the scope of his employment. *Okl Semiconductor Co. v. Wells Fargo Bank, N.A.*, 298 F.3d 768 (9th Cir. 2002).

It is widely held that one assumes the risks of dangers inherent in engaging in a sports activity. *Trembling v. West Experience, Inc.*, 745 N.Y.S. 2d 311 (App. Div. 2002). Where the plaintiff assumes such a risk, the defendant sports provider owes the participant no duty of care, and the doctrine of comparative fault has no applicability. *Allen v. Dover Co-Recreational Softball League*, 807 A.2d 1274 (N.H. 2002). This no-duty rule is often described as primary assumption of the risk by the sports participant.

The elements of negligence are the existence and breach of a duty, causation, and damages. It is doubtful whether the Ski Mountain could be found negligent in maintaining the retaining barrier, since such a barrier may be necessary for the safety of the skiers and its presence was obvious. In view of the no-duty rule, the question of negligence does not even arise.

Molly will claim vicarious liability of Ski Mountain through negligent rescue by the patrol. No negligence may be present, however, since the slip may have been accidental through no fault of the patrol.

Many states have a Good Samaritan statute, whereby one who rescues a victim without charging the victim compensation therefor will not be liable for negligence in the rescue, but will only be liable if the rescue attempt is reckless or willful and wanton. *Hutton v. Logan*, 566 S.E.2d 782 (N.C. App. 2002). If such a statute is present here Ski Mountain should not be liable, because there is no evidence that Peter's rescue was reckless.

If Ski Mountain could be found liable, Molly's negligence in causing her own injury and thus creating the need for a rescue could reduce her recovery in a comparative fault jurisdiction, or bar recovery under a modified comparative fault or contributory negligence rule. Molly as a minor would be held to a standard of care of a child of like age, intelligence and experience. *Goss v. Allen*, 360 A.2d 388 (N.J. 1976). The standard would be that of an ordinary adult if Molly were engaged in an adult activity, but it has been held that skiing is not an adult activity. *Id.*

If Molly could recover for the injuries attributable to the rescue, these damages would need to be separated from those attributable to the initial injury, for which Ski Mountain would not be liable. If the two types of damages were practically indivisible, there is a division of

authority as to who has the burden of proof. Compare *La Moureaux v. Totem Ocean Trailer Express, Inc.*, 632

Peter Against Molly

In the case of Molly against Ski Mountain, the child standard of care will be raised as a defense in Peter's suit against Molly for skier negligence which precipitated the rescue attempt and Peter's consequent injury. As considered above, the child standard may apply with no adult-activity exception applicable.

It is widely held that a rescuer can recover for injuries incurred in effecting a rescue, whether the injuries be caused by the negligence of the person to be rescued or by the negligence of another who made the rescue necessary. *Minnich v. Med-Waste, Inc.*, 564 S.E.2d 98 (S.C. 2002).

A number of states, however, bar the professional rescuer from recovery for injuries caused by the negligence which made the rescue necessary. *Farmer v. B & G Food Enterp., Inc.*, 818 S.2d 1154 (Miss. 2002). Some limit the professional rescuer rule to firefighters and police, *Lees v. Lobasco*, 625 A.2d 573 (N.J. Super. 1993), while others extend it to all professional rescuers. *See Annot.*, 89 ALR 4th 1079 (1991). Some jurisdictions, as in *Minnich supra*, have abolished the rule altogether. Depending on the applicable law, Peter may or may not have an action against Molly for her negligence in causing the accident which necessitated the rescue.

ESSAY Q6

SEAT

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ISSUE

POINTS
AWARDED

- | | |
|--|-------|
| 1. Molly may assert Negligence against Lodge. | 1. ○ |
| 2. The elements of Negligence are: | |
| 2a. Breach of Duty: | 2a. ○ |
| 2b. Causation: | 2b. ○ |
| 2c. Damages: | 2c. ○ |
| 3. Lodge is responsible for Peter's actions under <i>Respondeat superior/vicarious liability</i> | 3. ○ |
| 3a. Actions by the agent must be in the scope of the relationship. | 3a. ○ |
| 4. Molly may have a claim for negligent rescue against Peter and the Lodge. | 4. ○ |
| 5. Peter/Lodge would defend on the doctrine of assumption of the risk. | 5. ○ |
| 6. Peter/Lodge would defend on the doctrines of contributory or comparative negligence. | 6. ○ |
| 7. Peter can assert a claim of negligence against Molly. | 7. ○ |
| 8. Molly would be held to a standard of care commensurate with her age. | 8. ○ |
| 9. Peter's professional status may be a factor in his claim against Molly. | 9. ○ |

QUESTION 3

The Capital City Wolves are a professional football team. Dave Fan has season tickets to Wolves games. Very early in a Wolves game played after a snowfall, the head referee (Ref), announced a penalty against the Wolves. Fan became angry and, from his front-row seat, he threw a snowball at Ref. Ref saw the snowball coming and moved his head just in time to avoid being struck. Instead of striking Ref, the snowball struck the starting quarterback for the Wolves (Star). It hit the back of Star's helmeted head as he stood on the field talking with his teammates. Though Star was not injured by the impact, he was startled and jumped to the side in reaction to the snowball that struck him. In doing so, he collided with one of the Wolves' coaches (Coach) who was on the field because play had stopped. Coach was not wearing any protective gear (obviously) and broke his arm when he was knocked to the ground by Star.

QUESTION:

Discuss Fan's potential liability, including damages, to Ref, Star, and Coach.

DISCUSSION FOR QUESTION 3

The question raises several issues in tort. One of the issues raised is the distinction between the torts of battery and assault. Unlike battery, assault requires *apprehension* but no *contact*. Therefore, Dave is likely liable to Ref for assault but not for battery because Ref saw the snowball coming but moved just in time to avoid being struck. Dave is likely liable to Star for battery but not for assault because Star did not see the snowball coming but was actually struck by the snowball.

Another key issue in tort that is raised is the difference between torts requiring a showing of intent versus those requiring mere negligence. Given that distinction, Dave is also likely liable to Coach, at least, in negligence.

I. ASSAULT

The elements of the tort of assault are: (1) an act; (2) intent; (3) causation; (4) apprehension of imminent harmful or offensive contact; and, (5) lack of consent by the plaintiff. CJI-Civ. § 20:1; Restatement (Third) of Torts § 5, Restatement (Second) of Torts § 21, 24, and 33.

The elements of assault in actions by Ref and Star would likely be resolved as follows:

<u>Element</u>	<u>Ref v.Dave</u>	<u>Star v.Dave</u>
Act?	yes	yes
Intent?	yes	yes
Causation?	yes	yes
Apprehension?	yes	no
Lack of Consent?	yes	yes

To prove intent, Dave need only be shown to have acted with either the intent to cause the type of harm suffered or the intent to do the act that is “substantially certain” to cause that type of harm. Restatement (Third) of Torts § 1.

Although Dave had no intent to harm Star, his intent to harm Ref can be transferred to Star. *Id.* at § 33, CJI-Civ. § 20:8 (“It is not necessary that the defendant intended to make physical contact specifically with the plaintiff. Intent exists even if the defendant originally intended to make physical contact with someone else.”). Likewise, he may not have intended to harm anyone in particular.

Dave will argue that Ref suffered no true “apprehension” because apprehension must be somewhat significant. The plaintiff must have been in fear of imminent physical harm, not merely have suffered a “fright.” Restatement (Second) of Torts § 24 n.b. Still, Ref might argue that he suffered significant apprehension, the amount of which goes only to the potential for nominal damages. CJI-Civ. § 20:4 n. 7.

Dave might also argue that, by consenting to take the field during an admittedly violent activity (football), the various plaintiffs had somehow consented to a risk of injury while on the field; he might try to argue that, in fact, the threat of harm posed by his action (throwing a snowball) is generally less than any posed by football. However, his argument would not be well founded, as one's consent only bars torts that pose the same or substantially the same risk posed by the tort to which the plaintiff has consented. Restatement (Second) of Torts § 892(A), CJI-Civ. § 20:11. While the various defendants may have consented to the athletic risks associated with a game of football, there is no evidence that any consented to the risk of projectiles thrown by spectators.

II. BATTERY

The elements of the tort of battery are: (1) an act; (2) intent; (3) causation; (4) harmful or offensive bodily contact; and, (5) lack of consent by the plaintiff. CJI-Civ. § 20:5 and 6; Restatement (Third) of Torts § 5, and Restatement (Second) of Torts § 13-20.

The elements of battery in actions by Ref and Star would likely be resolved as follows:

<u>Element</u>	<u>Ref v. Dave</u>	<u>Star v. Dave</u>
Act?	yes	yes
Intent?	yes	yes
Causation?	yes	yes
Contact?	no	yes
Lack of Consent?	yes	yes

III. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Any of the potential plaintiffs might consider asserting a claim for the intentional infliction of emotional distress.

The elements of the tort of intentional infliction of emotional distress, a/k/a IIED, a/k/a outrageous conduct, are: (1) an act (by Dave) of outrageous conduct; (2) intent; (3) causation; and, (4) damages, including at least severe emotional distress. Restatement (Third) of Torts § 45, CJI-Civ. § 23:1.

To constitute outrageous conduct, the conduct must be so extreme that a reasonable person would exclaim, "That's outrageous." Restatement (Third) of Torts § 45. In other words, a reasonable person would view it as exceeding "all possible bounds of decency and utterly intolerable in a civilized community," quoting CJI-Civ. § 23:2. Dave will argue that the simple act of throwing a snowball, as bad and irregular as this was, is still not that far outside of normal social function. Additionally, he can argue that a single incident, such as this, is also less likely to constitute outrageous conduct. *Id.*, n. 5.

Dave also will argue that damages in such a claim must at a minimum include severe emotional distress. Restatement (Third) of Torts § 45. Severe emotional distress consists of highly unpleasant mental reactions, such as (nervous shock, fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, or worry) and is so extreme that no person of ordinary sensibilities could be expected to tolerate and endure it. The duration and intensity of emotional distress are factors to be considered in determining its severity. CJI-Civ. 23:4. Some jurisdictions also require physical injury as a component of the plaintiff's damages. Restatement (Third) of Torts § 45, Restatement (Second) of Torts § 46(k). According to those definitions, Dave will argue that none of the plaintiffs suffered *severe* emotional distress.

IV. NEGLIGENCE

All three – Ref, Star and Coach – may also have a claim of negligence against Dave. If a tortfeasor's mental state is insufficient to constitute intent, it may still be sufficient to constitute negligence. Restatement (Third) of Torts § 1(d). The elements of a negligence claim are: (1) a duty owed by Dave; (2) a breach of that duty through the commission of negligent act; (3) causation; and, (4) damages. CJI-Civ. 9:1.

Dave owed a duty to exercise reasonable care. Restatement (Third) of Torts § 7, CJI-Civ. § 9:6 and 8. He may argue that he did not even consider Coach, but Coach will argue it was reasonably foreseeable that he, and anyone else standing on the field, could have been injured by Dave's act; therefore, Dave would owe them all a duty not to be negligent.

Dave also may argue he did not cause Coach's injury. To prove causation, Coach must show that Dave's act of throwing the snowball was both the actual ("but for") and proximate ("legal") cause of his injuries. Restatement (Third) of Torts §§ 26, 27, and 29, CJI-Civ. § 9:18 and 21. He will argue it was reasonably foreseeable that someone, at whom a snowball is thrown, would move as both Ref and Star did and, further, that someone could be hurt, as Coach was, especially because the players, like Star, are large, powerful, and effectively armored. In other words, Coach could argue Ref and Star's actions were foreseeable "reaction" forces for which Dave is liable, not an intervening force. Restatement (Third) of Torts § 34.

V. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

The elements of the tort of negligent infliction of emotional distress are: (1) an act of negligence; (2) that created an unreasonable risk of physical harm to the plaintiff; (3) that caused the plaintiff to be in fear of his safety (not simply a "momentary fright"); (4) causation; and, (5) damages. Restatement (Third) of Torts §§ 46 and 47, CJI-Civ. § 9:2.

This tort only applies if the plaintiff was himself put in an unreasonable risk of physical harm, a/k/a, within the "target zone" or "zone of danger." (Although some exceptions exist to permit claims by family members, such as parents of children, no such exception is raised by these facts.) Restatement (Third) of Torts §§ 46 and 47, Restatement (Second) of Torts § 26.

VI. DAMAGES

Dave will argue that Ref and Star had little to no damage. Even then though, they might claim nominal damages and the value of any mental anguish they suffered. Dave also may argue that Coach's damages were not caused by his act of throwing the snowball but more so, or at least in part, by Star's movement to jump into Coach. Restatement (Third) of Torts § 34, CJI-Civ. § 9:20. The argument can be viewed as one of damages (e.g. comparative fault) and/or causation (intervening force). Restatement (Third) of Torts § 34 n. c-d.

As explained, Coach will argue, though, that Dave is liable under both theories since Star's action was the sort Dave should reasonably have foreseen (reaction force).

None would recover attorney fees.

ESSAY Q3

SEAT

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<u>ISSUE</u>	POINTS AWARDED
1. Dave may be liable for <i>assault</i> .	1. ○
1a. The elements of assault include intent, apprehension and lack of consent.	1a. ○
2. Apprehension must be reasonable.	2. ○
3. Dave may be liable for <i>battery</i> .	3. ○
3a. The elements of battery include intent, contact and lack of consent.	3a. ○
4. Dave may be liable for <i>intentional infliction of emotional distress (outrageous conduct)</i> .	4. ○
4a. The elements of IIED (OC) include intent, outrageous conduct and severe emotional distress.	4a. ○
5. Outrageous conduct is conduct so outrageous that a reasonable person would say "outrageous!" (or, say it was beyond all possible bounds of decency).	5. ○
6. Intent can be transferred (from Dave's intent v. Ref to Star and perhaps even Coach).	6. ○
7. Dave may be liable for <i>negligence</i> .	7. ○
7a. The elements of negligence include duty of reasonable care and breach (negligent act).	7a. ○
8. Dave may be liable for <i>negligent infliction of emotional distress</i> .	8. ○
8a. The elements of NIED include an unreasonable risk of physical harm to plaintiff and actual fear (not just "momentary fright").	8a. ○
9. NIED does not apply unless the plaintiff was put in an unreasonable risk of physical harm ("target zone" or "danger zone").	9. ○
10. Causation requires both actual ("but for") cause and proximate ("legal") cause.	10. ○
11. Whether the mousetrap-like series of events is viewed as an issue of duty or causation/damages, the plaintiffs' damages must have been "reasonably foreseeable."	11. ○